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APPENDICES.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 19

No. 747

SHAW WAREHOUSE COMPANY, BIRMINGHAM ICE AND COLD STORAGE COMPANY, and BOGGS COLD STORAGE COMPANY,
Petitioners,

vs.

SOUTHERN RAILWAY COMPANY, et al.,
Respondents.

APPENDICES TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR FIFTH CIRCUIT.

St. Louis Law Printing Co., Inc., 415 N. Eighth Street. CEntral 1-4477.

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APPENDIX A.

STATUTES RELIED ON.

Section 2 of the Interstate Commerce Act (49 U.S.C., § 2):

> If any common carrier subject to the provisions of this chapter shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property . . . subject to the provisions of this chapter, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation . . . of a like kind of traffic . . . under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is prohibited and declared to be unlawful.

Section 3(1) of the Interstate Commerce Act (49 U.S.C., § 3 (1)):

> It shall be unlawful for any common carrier subject to the provisions of this chapter to make or give any undue or unreasonable preference or advantage to any particular persons, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. . . .

Section 6(7) of the Interstate Commerce Act (49 U.S.C., § 6 (7)):

> . . . nor shall any carrier charge or demand or collect or receive a greater or less or different com-

pensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.

Section 8 of the Interstate Commerce Act (49 U.S.C., 8):

> That in case any common carrier subject to the provisions of this part shall do, cause to be done, or permit to be done any act, matter, or thing in this part prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this part required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this part, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

Section 9 of the Interstate Commerce Act (49 U.S.C., 9):

> Any person or persons claiming to be damaged by any common carrier subject to the provisions of this chapter . . . may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter, in any district court of the United States of competent jurisdiction; . . .

APPENDIX B.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

SHAW WAREHOUSE COMPANY, BIRMINGHAM ICE AND COLD STORAGE COMPANY, and BOGGS COLD STORAGE COMPANY,

versus

SOUTHERN RAILWAY COMPANY, ET AL.,

No. 18138

United States Court of Appeals,

Fifth Circuit.

(March 3, 1961.)

288 F. 2d 759.

[761] Before Hutcheson, Brown and Wisdom, Circuit Judges.*

Wisdom, Circuit Judge: Shaw Warehouse Company, Birmingham Ice and Cold Storage Company, and Boggs Cold Storage Company sued the Southern Railway Corporation and two of its subsidiaries—The Alabama Great Southern Railway Company and The Georgia Industrial Realty Company[1]—under Sections 8 and 9 of the Interstate Commerce Act.[2] 49 USCA, §8 and §9. The

[1] Georgia Industrial Realty Company is a wholly-owned real estate holding company that acts as the land department of the Southern. It is a defendant only in the action brought by Birmingham Ice.

[2] Section 8 of the Interstate Commerce Act (49 U.S.C. §8) reads: "That in case any common carrier subject to the provisions of this part shall do, cause to be done, or permit to be done any

* [*Counsels' notes—Counsels' footnotes printed in italics have been added, using letter designations.*]

complaint alleges that the defendants violated Sections 2, 3(1), and 6(7) of the Act.[3] 49 USCA, §§2, 3(1), 6(7). These sections prohibit a railroad from giving "any undue or unreasonable" concession, such as a preference or rebate, or from departing from published tariffs.[4]

The case is unusual.[5] The plaintiffs are not shippers or receivers of freight. They do not purport to render transportation services. Shaw Warehouse is served by

act, matter, or thing in this part prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this part required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this part, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case."

Section 9 of the Interstate Commerce Act (49 U.S.C. §9) reads: "Any person or persons, claiming to be damaged by any common carrier subject to the provisions of this chapter . . . may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter, in any district court of the United States of competent jurisdiction; . . ."

[3] Shaw and Boggs allege also a violation of Section 20(a) of the Act. We find it unnecessary to discuss this section, since we consider it clearly inapplicable.

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[4] *Section 2 provides that carriers employing "special rates, rebates, drawbacks, or other devices" by which some persons are charged a greater or lesser compensation for transportation services "shall be deemed guilty of unjust discrimination, which is prohibited and declared to be unlawful." Section 6(7), as noted by the opinion, requires strict adherence to tariffs and prohibits the extension of any privileges or facilities in the transportation of passengers or property, except as are specified in such tariffs. See Court's note 11, infra.*

[5] *See* Southern Railway Co. v. United States, 186 Fed. Supp. 26, 36 (N. D. Ala. 1960), *where the Court stated, "The railroad rental practices condemned by the Commission are not novel. They are but variations of practices which have been uniformly condemned by the Commission and the courts under both the Interstate Commerce Act and its cognate statute, The Elkins Act, 49 U.S.C.A. §§ 41-43, which, for such purposes have been considered to be pari materia."*

Southern but the other plaintiffs have no direct relationship with the carrier. The plaintiffs are public warehouse companies in Birmingham, Alabama. Each claims damages for business losses attributable to discriminatory rental practices in Southern's operation of a terminal, the Birmingham Food Terminal Corporation. The Act goes back almost seventy five years. 24 Stat. 379 (1887). In a number of cases, Courts[4] and the Interstate Commerce Commission have held that a railroad's rental practices in operating a terminal may violate the Act,[5] but we have

[4] See, for example, Baltimore & Ohio R.R. v. United States, 1939, 305 U.S. 507, 59 S.Ct. 284, 83 L.Ed. 318, affirming 20 F.Supp. 372, (1937), in which the Court indicated that warehousemen suffered severe damages.

[5] In a proceeding before the Interstate Commerce Commission instituted by Shaw Warehouse Company, in which Birmingham Ice & Cold Storage intervened, the Commission issued an order requiring Southern to cease and desist from the same practices complained of here. Warehouse Co. v. Southern Railway Company, et al. 308 I.C.C. 689 (1959). Southern sued to enjoin and set aside the Commission's order. A three-judge court upheld the report and order of the Commission. Southern Railway Company, et al. v. United States, N.D. Ala., 1960, 180 F.Supp. 20. On the request of counsel for the parties, Judge Seybourn H. Lynne, the trial judge in the private litigation, did not recuse himself. Judge Lynne was the organ of the three-judge court.

Appellants assert that the Commission decision is authoritative and that failure of this Court to decide in their favor will produce "paradoxical results". But the thrust of this private litigation and the thrust of I.C.C. proceedings in the interest of the public are different; the issues of causation and injury present in this case were not present in the I.C.C. proceedings.[6] The records are dif-

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[6] *Boggs Cold Storage also intervened, but it subsequently was forced out of business and it could no longer benefit from a cease and desist order. Shaw Warehouse Co. v. Southern R. Co., 308 I.C.C. 689, n. 3 at 694.*

[7] *The cases below were consolidated for a separate trial on the issue of liability only, i.e., whether Southern violated the Commerce Act. Petitioners were prohibited from proving their damages, but were required by the trial judge to present a prima facie case of injury (R. 167). On appeal Petitioners complained of the Court's charge to the jury, in such a trial, that the verdict should*

been able to [762] find only one case in which a warehouseman sued a carrier for damages based on discriminatory rental practices.[6]

The complaint alleges that the Terminal leased warehouse facilities to the plaintiffs' competitors at rentals lower than the prevailing rentals for such facilities in Birmingham and did not require the tenants to make timely payments of rent. Such concessions would reduce the tenants' need for working capital. As a result of this unlawful advantage, the plaintiffs say, their competitors at the Terminal were able to cut rates and offer atractive inducements to customers—causing the plaintiffs to lose some of their storage accounts and to make costly rate reductions to keep other accounts. Southern, so the argument runs, expected to offset losses from concessions with increased freight revenues.

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ferent: there was considerable evidence before the jury that was not before the Commission. The jury may have found that Southern violated the Act, but that the violations caused no injury to the defendants." There is no necessary inconsistency, therefore, between the jury's finding and the Commission's finding.

The appellants had the right to seek damages before the Commission or before the district court. They chose the district court. They failed in that forum. We are unimpressed with the argument that we should reverse the verdict in the forum below on the strength of a finding in another forum. The opinions of the Commission and of the three-judge court are valuable on the questions of law pertinent to this appeal, and to that extent are entitled to weight. With deference to the Commission and to the three-judge court, this Court still must decide the appeal on the record before us and in the light of the law as we read it.

[6] Pittwood v. Northern Pacific Railway, 51 I.C.C. 635 (1918); order approved in Fireproof Storage Co. v. Hines, E.D. Wash., 1919, 261 Fed. 215.

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be for the defendant unless the Petitioners had gone further and proved "an injury or damage which is capable of being transplanted into dollars and cents" (R. 783); the trial court itself, by submission of the case to the jury, had ruled that a prima facie case of injury had been shown. See note 5 to dissent of Judge Brown, infra, 294 F. 2d at 854.

" See Counsels' Footnote d, supra.

Southern denies that it made any undue concessions, asserts that there was no discrimination in relation to transportation (prerequisite to the plaintiffs' recovery under the Act), and insists that in any event there was no causal connection between its actions and the alleged injury, if any, to the plaintiffs.[7] Southern argues that the plaintiffs seek to protect an entrenched warehousing position at the expense of consumers and the food distribution industry in the Birmingham area.

The district court consolidated the three suits for trial before a jury on the sole issue of the defendants' liability. The court narrowed the major factual issues to two: (1) "Was the rent charged to the tenants of the Birmingham Food Terminal a fair rental, in view of all the circumstances, a fair market rental, or was it less than the fair market rental, or was it less than a compensatory rental?" (2) "[If] you decide that it was a fair market rental and that it was a compensatory rental, then there would be a second question because the plaintiff is saying in each case that if it is conceded that the rental was a fair market rental or a compensatory rental, the railroad was guilty of unlawfully extending its credit to the tenants by failing to use due diligence in collecting the rent." The jury returned verdicts for the defendants.

[7] At the conclusion of the evidence, both the plaintiffs and the defendants moved for directed verdicts. The trial judge denied the motions. After the jury returned verdicts for the defendants, the plaintiffs moved for judgments notwithstanding the verdicts, or, in the alternative, for new trials. The motions were denied. The actions were consolidated for appeal.

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[8] *This Court stated in* Union Pacific R. Co. v. United States, 313 U.S. 450, 467 (1941):

> "... *it is the result and not the purpose which determines the illegal character of advantages granted shippers, when there is a purpose or plan for securing traffic, developed co-operatively by a carrier and others, the purpose makes clear that the concessions offered are in respect to transportation.*"

[9] *See Counsels' Footnote d, supra.*

We hold that the district court properly refused to direct a verdict, properly submitted the case to the jury, and properly charged the jury. Substantial evidence supports the verdicts.

I.

A compressed review of the complex background facts relating to the promotion and financing of the Terminal is essential to an understanding of the issues.

For several years prior to 1954, Southern attempted to sell certain property in [763] Birmingham known as the Finley Yard. This was the site of an abandoned roundhouse and some twenty dilapidated buildings that became obsolete when Southern substituted diesel locomotives for steam locomotives. In January 1954 the Jefferson County Truck Growers Association, a farmers cooperative, showed an interest in the property as a possible location for a new produce market outside of the congested business section of Birmingham. The Truck Growers are not shippers or receivers of freight in interstate commerce, and could not conceivably compete with the plaintiffs. The Association's interest happened to coincide with a program of the railway for developing produce terminals in Chattanooga, Knoxville, Louisville, Richmond, and other cities as a bona fide freight-producing endeavor. So, the defendants say. Using the Truck Growers Association as a nucleus for a unified food warehousing facility located at a point outside the reciprocal switching district, Southern expected to gain new revenues estimated at $300,000 to $500,000 a year. The location would allow the Terminal to be served exclusively by Southern and its system lines, giving Southern a virtual monopoly of the produce traffic and forcing produce dealers in the area to move to the Terminal or perish. So, the plaintiffs say.

In April 1954, to help the inital promotion, Southern employed one Joseph DeOreo, a professional promoter experienced in railroad freight promotions.[8] Southern, working with the Truck Growers, expanded the project into a fully integrated food terminal, including cold and dry storage warehouses, to be used in storing, processing, and distributing food and related products. The facilities were to be leased for long terms, at the expiration of which the property would be sold to the tenants.[9] The organized efforts went on for months. They were open and above board. Anyone had the right to participate—a right of dubious value to established warehouses long settled at their own locations. In February 1955 Southern

[8] DeOreo helped promote the Union Pacific's Feed Terminal at Kansas City. See Union Pacific v. United States, 1941, 313 U.S. 450, 61 S.Ct. 1063, 85 L.Ed. 1435, footnote 18. According to the plaintiffs, DeOreo was to head off the efforts of the Truck Growers Association to build a new produce market of its own that might block Southern's scheme. Instead DeOreo was to use the Truck Growers to "corral" enough large rail receivers to force all of them to "join the parade or perish."

[9] *The property was originally to be sold prior to construction. The sale was described by an officer of Southern:*

> *... the sale of the Southern Railway property to individual business concerns who are expected to produce rail freight and revenue. This problem is not unique to Finley Shop area nor to Birmingham. The big difference here, of course, is the proposed underwriting by the Southern of $4,000,000 to $5,000,000 worth of improvements on the property.* (R. 950)

[10] *Promoter DeOreo was instructed by Southern's Line Vice President Brown as follows:*

> *"You had best operate alone as an expert in your field without the color of any particular railroad influence appearing at the outset. Naturally, our people would want to continue in quiet communication with you so that they and you could be jointly thinking about a site against the happy circumstance that success will attend your efforts."* (R. 884)

Only Mr. Shaw ever attended such a meeting (R. 283). Birmingham Ice did not learn of Southern's proposal until May 1955, when Southern had already made its commitment to build two new cold storage warehouses for Nelson Company and Terminal Cold Stor-

and other interested persons finally organized the Birmingham Food Terminal and incorporated it, primarily as a conduit to Southern but also to establish a legal entity to deal with financing companies and contractors. The Terminal corporation is a "shell"; it is a non-profit corporation having no office space and no employees.

The original stockholders in the Terminal Corporation were the prospective tenant-purchasers. Only two of these, Nelson Company and Birmingham Terminal Cold Storage Company, were competitors of the plaintiffs.

The organizers' plan contemplated a sale of the Finley property (84.935 acres at $2500 an acre)* from Southern through the Realty Company to the Terminal, without any down-payment and with the use of Southern's credit to obtain financing at a rate favorable to the purchasers. In payment, the Realty Company was to take a second mortgage from the Terminal on which four per cent interest would be paid annually, the principal to become due in twenty-five years. The Terminal Corporation was to finance the costs of construction by a loan from a lending agency, the loan to be guaranteed by Southern and secured by a first mortgage. Terminal would then lease the land and improvements to Realty Company for twenty-five years at a rental equivalent to the payments required under the first mortgage. This lease would be assigned to the lending agency as collateral security. Thereafter, the Realty Company would lease back to Terminal [764]

* *The plan contemplated the use of 102.02 acres, of which the tenants would be required to pay for only 79.686 acres, the use of the remainder, consisting of track strips and driveway areas would be donated by Southern.* (R. 241, 1036, 1033-34, 805-806). *See* 308 I.C.C. at 360).

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age Company (R. 303-304, 305, 962-963). Officials of Southern refused even to discuss the effect of their operation with Birmingham [illegible] except in the presence of the new competitors Southern had already agreed to subsidize (R. 305-306).

Corporation the same property for the same rental period at substantially the same rent. The property would then be sold to the tenant-purchasers, subject to the mortgage and leases.

To secure the first mortgage loan Southern would execute an agreement with the first mortgagor guaranteeing the performance of all the obligations assumed by Realty Company under its lease of the property from Terminal Corporation. The purpose of this guarantee was to permit each tenant to purchase his facility independent of the other tenants, without being required to make any down-payment on the purchase price. At the same time, it made possible a low interest rate because of reliance on Southern's credit. The purchase price included the interest costs of the interim financing required during the period of actual construction. The plaintiffs contend that the price did not represent anything like the full value of the property, since Southern was to pay a part of the costs and retain title to certain track and tramway areas. The alleged gap between the price and the value of the property is of critical importance, because the rental formula depended on the cost base.

After the company was organized, Terminal obtained a commitment for a construction loan from the Equitable Life Assurance Society. Terminal engaged a building contractor. The contractor ordered steel fabricated specially for the building. Many of the prospective tenant purchasers cancelled existing leases and made commitments preparatory to moving to the Terminal. The project was progressing smoothly according to plan when in September 1955 four competing carriers joined by Birmingham Ice, one of the plaintiffs here, filed a petition with the Interstate Commerce Commission questioning the legality of Southern's program for organizing food and produce terminals. Equitable Life promptly withdrew its commitment. The promotion collapsed.

Southern, faced with this emergency and under a strong moral obligation as well as a legal obligation to extricate the tenant-purchasers from their unhappy lot, agreed to go forward with construction of the project for its own account and thereafter lease the facility to the Terminal Corporation. A new agreement was entered into October 18, 1955, referred to in the proceedings below as the "Round Robin Agreement". This agreement requires Southern to complete the project and to lease the facilities to the tenant-purchasers under a separate lease to each, for a period of five years, with an option to renew for five years. Rental was fixed at the annual rate of eight per cent of the cost-base represented by the sales price, the Terminal Corporation to pay the costs of utilities and the Realty Company to pay taxes, insurance, and maintenance costs. The new agreement provides that the parties shall revert to their original plan, should that plan, to the satisfaction of Southern, be held valid by the proper authorities. The tenants were given an option to purchase the property at the cost price provided in the original plan at any time during the potential ten-year term of the lease.

The building was not completely finished until July 1957 but some of the tenants were permitted to occupy partially completed buildings at rentals based on percentage of occupancy and on the rental cost-base formula. In virtually all instances the billing and collection of these rentals lagged several months behind their due dates. As of January 1958, all of the tenants were in arrears since September 1957 or earlier. Nelson Company, the first occupant and the competitor the plaintiffs especially

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[1] *The so-called "legal obligation" embodied both the absorption of costs by Southern proscribed by the Commission, and the financing plan which was held in* Southern Railway Co. v. United States, *supra, to be illegal as "merely a more complex form of credit extension such as those condemned in* Vandalia R. Co., *supra.* C

condemn, moved in May 15, 1956. This company, a corporation with a capital of about $4,500, was furnished facilities costing more than $1,000,000. The Terminal finally evicted the company." (During the hearing before the Commission, Southern instituted an action against Nelson Company and Terminal Corporation for $135,000 in rental arrears.)" Birmingham Terminal Cold Storage Company, the plaintiffs' other competitor [765] at The Terminal, started with a capital of $1,000 (as any corporation may under the Alabama law). It was furnished cold storage facilities costing in excess of $1,000,000. This company too was evicted for non-payment of rent ($65,000)." The record shows, however, that a genuine dispute arose between Southern and the tenants over the proper amount of the rent under the Round Robin Agreement, because of the difficulty of ascertaining the accumulated costs essential to the computation of charges. This dispute delayed billing and collection of rents during the period of construction. It was not resolved until the tenants filed suit and a declaratory judgment was entered.

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[m] *Neither Terminal Cold Storage Company nor Nelson Company were actually erected. The stock of each was sold to H. C. Hudlow for the sum of $100 for each company, and the going business of each was transferred to Jefferson Cold Storage and Warehouse Company, a new $1,000 corporation organized by Hudlow, with the understanding that the new corporation would not pay any of the back rent owed by the companies which Hudlow had purchased* (R. 636-644, 655-656).

[n] *In the Commission proceeding Nelson testified that "regardless of any controversy he could not have paid his rent at any time"* (308 I.C.C. at 633). *Financial statements showing the insolvency of his company, introduced in the trial below, show the reason for that testimony* (R. 1109-1112).

[o] *See Counsels' footnote m, supra.*

[p] *The "genuine" dispute was merely an effort to further reduce rents. A declaratory judgment action was filed, with consent of Southern as part of an agreement to postpone, indefinitely part of all rent; Southern felt that the declaratory judgment action would help block pending damage suits* (R. 1036-1038). *No declaratory judgment settling any dispute has ever been entered. The action*

The Terminal has thirty buildings, several driveways, areas for future expansion, a restaurant, a filling station, and sixteen spur tracks. It occupies a rectangular area, 3,000 feet in length by 1500 feet in width. The buildings were constructed to the tenants' specifications, subject to certain basic standards. There are twenty-two tenants, not all of whom are stockholders of the Terminal Corporation. The buildings cost $6,125,690. According to Southern, the final rental-sale cost-base was $7,327,860; according to the plaintiffs, the minimum cost was $8,280,000. The difference of $952,000 represents items Southern allegedly improperly excluded from the cost-base."[9]

II.

Southern's motion for a directed verdict raises a serious question. Southern maintains that the plaintiff sued and tried the case on an indefensible theory; that even if it be

[9] Minimum Cost Exclusions by Southern—According to Plaintiffs.

Cost	Minimum Cost Table II	Cost Base Table III	Minimum Excluded
Paving, etc.	$ 619,586.42	$ 538,718.36	$ 80,868.06
Water System	107,502.98	110,577.19	(3,074.21)
Storm Sewers	217,516.85	211,437.45	6,079.40
Sanitary Sewers	54,221.31	51,278.81	2,942.50
Land	255,480.00	199,215.00	56,265.00
Grading	412,893.18	—0—	412,893.18
Tracks	111,000.00	—0—	111,000.00
Interest Cost	285,238.78	—0—	285,238.78
	$2,063,439.32	$1,111,226.81	$952,212.71

referred to is set for trial on April 23, 1962, together with an Elkins Act suit by the United States finally to require payment of rent on the basis of the Commission's order from 1957 to date. See Appendix E.

[9] *The sum of $952,000 is based wholly on costs figures established by a comparison of Southern's own records with its sworn answers to admissions and to interrogatories.* (R. 1036, 241, 417-118, 537, 118-120).

assumed that Southern violated Sections 2, 3(1), and 6(7) of the Act, the plaintiffs have failed to allege or to prove any injury to them caused by unjust *discrimination relating to transportation*, as required for the recovery of damages under the Act.

We note, first, that Sections 8 and 9 are narrower in scope than Sections 13(1) and 13(2). Section 8 allows an action for damages "to the person or persons injured . . . in consequence of any . . . violation" of the Act.[19] Section 9 allows "any person or persons claiming to be damaged" to sue in the district court. Section 13(1) allows "any person" to file a complaint with the Commission "complaining of anything done or omitted to be done by any common carrier . . . in contravention" of the Act. Section 13(2) allows the Commission to proceed on its own motion, and "no complaint shall at any time be dismissed because of the absence of direct damage to the complainant". Consequently, decisions dealing with the standing of a warehouseman to file a complaint with the Commission or decisions involving the validity of the Commission's cease and desist orders against warehousemen are not necessarily applicable **[766]** to a warehouseman's suit against a carrier for damages.

Section 2 prohibits "unjust discrimination" by "special rate, rebate, drawback, or other device", "directly or indirectly". Section 3(1) prohibits "any undue or unreasonable preference or advantage . . . in any respect whatsoever". Section 6(7) requires strict adherence to published tariffs, without regard to any particular discrimination; but, without the element of discrimination there can be no injury to one suing as a result of a departure from published tariffs. Each of these three sec-

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[19] See footnote 2

See Counsels' footnote 1, *supra*.

tions,[11] then, requires discrimination as an essential element of a violation of the Act upon which an action for damages may be based.[*] "What is unlawful in the action of the carriers inheres in its discriminatory quality and not in anything else." *Interstate Commerce Commission*

[11] Section 2 of the Interstate Commerce Act (48 U.S.C. §2) reads:

"If any common carrier subject to the provisions of this chapter shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property . . . , subject to the provisions of this chapter, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation . . . of a like kind of traffic . . . under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is prohibited and declared to be unlawful."

Section 3(1) of the Interstate Commerce Act (49 U.S.C. §3(1)) reads:

"It shall be unlawful for any common carrier subject to the provisions of this chapter to make or give any undue or unreasonable preference or advantage to any particular persons, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. . . . ."

Section 6(7) of the Interstate Commerce Act (49 U.S.C. §6(7)) reads:

". . . nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation or passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs."

[*] *See Counsels' footnote a, supra.*

v. United States, 1933, 289 U.S. 385, 53 S.Ct. 607, 77 L.Ed. 1273.[11] In this connection, we note that Sections 2, 3(1), and 6(7) differ from the Elkins Act, which prohibits departure from the published tariff rates "irrespective of its actual discriminatory effect." Cases under the Elkins Act, therefore, are not necessarily applicable to the instant case."

The statutory prohibitions have been applied broadly,[12] but, in terms, the Act penalizes a carrier for discrimination only with respect to transportation. Thus, Section 2 prohibits rebates and special rates "for any service . . . rendered, in the transportation of passengers or property"; Section 6(7) repeats the phrase "transportation of passengers or property". Section 3(1) does not refer specifically to transportation, but it is construed as so limited: "[T]he act is intended to deal with transportation. . . .

[12] See United States v. Union Stock Yard and T. Co., 1912, 226 U. S. 286, 33 S.Ct. 83, 57 L.Ed. 226; Southern Pacific Terminal Co. v. I.C.C., 1911, 219 U.S. 498, 31 S.Ct. 279, 55 L.Ed. 310; United States v. General Motors, 1955, 3 Cir., 226 F.2d 745; Central of Georgia R. Co. v. Ehling, 1917, 5 Cir., 238 Fed. 202; Vandalia R. Co. v. United States, 1915, 7 Cir., 226 Fed. 713; Cleveland C.C. & St. L.R. Co. v. Hirsch, 1913, 6 Cir., 204 Fed. 849, 852, 853

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[11] *This case involved a challenge under only Section 3 of the Commerce Act of blanket or group rates. The quotation referred to, in context, conveys a somewhat different meaning:*

> *"The Commission does not find, and the complainant does not assert, that the rate was unreasonable in the sense that it would be subject to condemnation if a like rate had been charged to others similarly situated. What is unlawful in the action of the carriers inheres in its discriminatory quality, and not in anything else. When discrimination and that alone is the gist of the offense the difference between one rate and another is not the measure of damages suffered by the shipper. . . ."*

The gist of the offense in these cases involves more than the discriminatory quality of Southern's practices—it involves indirect rebating devices prohibited by Section 2, and the granting of indirect tariff deviations and special privileges prohibited by Section 6(7).

[12] *See* Counsels' note b, *supra*.

The subject of the 'preference' or 'prejudice' is transportation of either persons or property." In re Huntington, S.D.N.Y., 1895, 68 F. [767] 881, 882. The Act defines "transportation" broadly. The term includes "all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and *all services in connection* with the receipt, delivery, transportation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported". 49 USCA §1(3). "Transportation", then, embraces terminal facilities used in the delivery, storage, or handling of freight—but this language does not solve the problem here. For discrimination, to exist, there must be a person prejudiced and a person favored. There is no proper basis for comparison unless there is substantial identity of situation and service, accompanied by an undue advantage to one, to the disadvantage of the other.[13] And, under Section 8, the plaintiffs still must show they were *injured by unlawful discrimination in relation to transportation.*[14]

Pittwood v. Northern Pacific Ry. Co., 1918, 51 I.C.C. 535 is the only decision passing on the validity of a warehouseman's claim for damages against a railroad for an unjust discrimination.[14] Pittwood owned and leased a building, suitable for a warehouse, immediately adjacent

[13] See United States v. Baltimore & O. R.R., 1908, 4 Cir., 165 Fed. 113, 121, rev'd on other grounds, 1910, 215 U.S. 481, 30 S.Ct. 164, 54 L.Ed. 292; United States v. Oregon R.R. & Navigation Co., 1908, D. Ore., 159 Fed. 975, 979; Logan Coal Co. v. Penn-Sylvania R.R., 1907, E.D. Pa., 154 Fed. 497, 500; Delaware, L. & W. R.R. v. Kutter, 2 Cir., 147 Fed. 51, 63, cert. denied, 1906, 203 U.S. 588, 27 S.Ct. 776, 51 L.Ed. 329.

[14] Commenting on the dearth of personal injury actions under provisions of the Federal Communications Act comparable to Sections 8 and 9 of the Interstate Commerce Act, the court stated, in Cutrair v. Mackay Radio & Telephone Co., S.D.N.Y., 1954, 123 F. Supp. 83, 89: "The absence of any such proceeding before the

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[14] *See Counsels' notes s, t, and t, supra.*

to the Northern Pacific railroad tracks in Spokane, Washington. He filed a complaint with the Interstate Commerce Commission asking for damages on the ground that the Northern Pacific rented warehouse property to shippers at nominal rentals. Pittwood contended that because of the carrier's low rentals he was unable to obtain a tenant. The Commission held: "A warehouse owner, a landlord seeking to rent his property, as such, has no relation with a common carrier which could result in a discrimination against him in violation of the act to regulate commerce. The discrimination there forbidden is in respect of transportation." The discrimination, such as it was, "was directed not against complainant or other warehouse owners, but against those shippers who were not lessees of defendant's warehouse"; "manifestly" the damages allegedly suffered "were not the direct and proximate consequences of discrimination between shippers by defendant". Later, Fireproof Storage Company, the successor in interest of Pittwood, filed suit for damages in the district court, relying on the same facts Pittwood had relied on in the I.C.C. proceedings. The court dismissed the complaint, stating: "[A] warehouse owner is not entitled to recover damages for depreciation in the rental value of his property as a result of leases by a railroad company of similar property at nominal rentals to shippers." *Fireproof Storage Co. v. Hines*, E.D. Wash., 1919, 261 Fed. 215, 217. [15]

Interstate Commerce Commission or before the Federal Communications Commission and the absence of any such action in the Federal courts shows the construction which has been placed on Sections 8 and 9 of the Interstate Commerce Act and on Sections 206 and 207 of the Communications Act by members of the Bar who specialize in personal injury actions."

[15] Mr. Pittwood was not a man easily discouraged. He intervened in Leases and Grants of Property by Carriers to Shippers,

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* *Pittwood was not a warehouseman, he merely owned real estate by the railroad; he claimed no injury to a warehouse business. The* Fireproof Storage Company *case was not a suit for damages.*

[768] The plaintiffs insist that in a later case the Commission overruled Pittwood. They refer to *McCormick v. Pennsylvania Railroad Co.*, 1925, 95 I.C.C. 301; 1928, 148 I.C.C. 299; order sustained in *Terminal Warehouse Co. of Baltimore v. United States*, D.C.Md., 1929, 31 F.2d 951. In the first McCormick case, the warehouseman complained to the Commission that three railroads in Baltimore had made concessions to certain preferred warehouse companies. McCormick conceded it was not "in any sense a shipper or receiver of freight." The Commission, relying on Pittwood, held: "When consideration is given to the assertion of complainant that it is not a shipper or receiver of freight, the conclusion must be reached that it has no relation with a common carrier which could result in a discrimination against it in violation of the Interstate Commerce Act. The discrimination there forbidden is in respect to transportation." McCormick then amended the complaint by eliminating all of the defendants except the Pennsylvania and alleging that both complainant and Terminal Warehouse Company, the preferred warehouse company, were shippers served by the Pennsylvania.

1922, 73 I.C.C. 671, a proceeding instituted by the Commission on its motion. The Commission said: "In this proceeding, no shipper or receiver of freight at Spokane complained of the leases made by the railway company or alleged that they were in any way unduly prejudicial to him or unduly preferential of his business competitors. Complaints were made by owners of warehouses in Spokane, who contended that they were unable to lease their properties on advantageous terms because of the competition of the railways in the matter of rental charges. One of these complaints was separately heard in Spokane at the time of the hearing in this investigation. The complainant was not a shipper, and we held that we were without jurisdiction to grant the relief requested. Pittwood v. N.P.Ry.Co. . . . See also Fireproof Storage Co. v. Hines. . . ." 73 I.C.C. at 681

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it was an action for injunctive relief which the court probably had no jurisdiction to grant, the language quoted is merely description of the Pittwood *case.*

The amended complaint charged that the Pennsylvania, in the form of allowances for loading and unloading carload package freight, made refunds to Terminal, thereby collecting less compensation from Terminal than it collected from McCormick for "rendering like and contemporaneous transportation services under substantially similar circumstances and conditions, in violation of Sections 2 and 3" of the Act. After a hearing on the amended complaint, the Commission issued a cease and desist order. Terminal filed suit in the district court to enjoin and set aside the order. The Court approved the order of the Commission.

We do not read McCormick as overruling Pittwood.[*] Nor does it appear that the Commission considered that it was overruling Pittwood. After amendment of the complaint, McCormick concerned two shippers and a discriminatory allowance to one for what were clearly transportation services. Moreover, McCormick was not an action for damages, as was Pittwood, but was a proceeding for a cease and desist order. As the Commission itself recognized in the proceeding instituted by Shaw Warehouse against Southern, "[t]he Commission is the guardian of the general public interest and proceedings before it are not in the nature of private litigation". *Shaw Warehouse Co. v. Southern Railway Co., et al.*, 308 I.C.C. 609, 611 (1955).

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[*] *See the view of* McCormick *case taken by Mr. Justice Cardozo in* Terminal Warehouse Co. v. Pennsylvania R. Co., 297 U.S. 500, 505-506, 511-516 (1936), affirming 78 F.2d 591 (Cir. 3, 1935), overruling 7 F. Supp. 484 (Ed. Pa. 1934). *There a warehouseman sued under the Clayton Act complaining of injury to his business by reason of railroad conduct which the Commission had held violated the Commerce Act; it was held that he could not sue for damages under the treble damage provisions of the Anti-Trust Act because the exclusive remedy for such a warehouseman was under Sections 8 and 9 of the Commerce Act. See also the view of Three-Judge Court relative to* Pittwood *and* McCormick *cases in Counsels' note (*) the opinion on rehearing, infra.*

Nevertheless, the second McCormick opinion is based in part on reasoning that supports the plaintiffs' position here. The Commission stated: "It is our view that the Terminal [Warehouse Co.], even though not the owner of the goods, has been given dominion over such goods for transportation purposes and that accordingly for transportation purposes it should be deemed to be the consignor of shipments from and consignee of shipments to its warehouse."[16] 148 I.C.C. [769] 301, 306. Similarly, Judge Lynne, in *Southern Railway Co. v. United States*, 1960, 186 F. Supp. 29, 42, speaking of the same warehouse companies which are the plaintiffs here, pointed out that warehouses, like freight forwarders, are so closely connected with transportation that they should have the status of shippers and receivers of freight.

The Supreme Court has sanctioned this principle in cases upholding orders of the Commission. *Merchants Warehouse Co. v. United States*, 1931, 283 U.S. 501, 51 S.Ct. 505, 75 L.Ed. 1227, affirming D.C.E.D.Pa., 1930, 44 F.2d 379, sustaining *Gallagher v. Pennsylvania R. Co.*, 160 I.C.C. 563 (1929); *Terminal Warehouse Co. v. Pennsylvania R. Co.*, 1936, 297 U.S. 500, 56 S.Ct. 546, 80 L.Ed. 827, affirming 3 Cir., 1935, 78 F. 2d 591, overruling D.C.E.D.Pa., 1934, 7 F. Supp. 484. See also Propriety of Operating Practices—New York Warehousing, 198 I.C.C. 134 (1933), 216 I.C.C. 291 (1936); affirmed, 220 I.C.C. 102

[16] In the McCormick case there is no intimation that all warehousemen should be treated as shippers. In its opinion, the Commission carefully mentioned specific referents: the dealings of the defendant carrier were with the complainant, and not with the owners of the freight; as to many of the inbound shipments, the complainant was the only party to whom delivery of car-load shipments could be made, the real owners being out-of-town companies which shipped to the complainant for distribution in less-than-carload lots; the owners gave the complainant dominion over the goods for transportation purposes.

[*] *Relative to the* Terminal Warehouse Co. *case see note x, supra.*

(1937); and sustained, *Baltimore and Ohio R. Co. v. United States*, 20 F. Supp. 273 (1938), affirmed 1939, 305 U.S. 507, 59 S.Ct. 284, 83 L.Ed. 318.[17] In the Baltimore and Ohio case one of the carriers had leased space to a warehouse company at less than the cost of the space to the carrier. The Supreme Court observed that unlawful discrimination even as to non-transportation services violates Section 6(7), since "a savings on the non-transportation services obviously figures out the

[17] Propriety of Operating Practices—New York Warehouses, 198 I.C.C. 134, (1933) and 216 I.C.C. 291 (1936) aff'd 220 I.C.C. 102, 1937, was a result of the Commission's comprehensive investigation of indirect concessions by railroads to warehouses in the New York area. Some of the railroads granted concessions, such as the in-transit service of removing cargo from water carriers, storing the cargo for a long period, and reloading it upon railroads, at noncompensatory rates. The nature of some customers' business prevented their using this in-transit service. On the complaint of competing warehouse operators the Commission issued an order directing certain carriers to cease performing the services at less than compensatory rates. The carriers brought suit to enjoin enforcement of the order, contending among other contentions the Terminal facilities were not transportation services. In Baltimore & Ohio R. Co. v. United States, 1939, 305 U.S. 507, 59 S.Ct. 284, 83 L.Ed. 318, aff'g 20 F. Supp. 372, the Supreme Court affirmed the district court's dismissal of the suit. The Court stated

> "As the shippers of the Port of New York district can utilize, in many instances, commercial storage and other warehousing services in addition to rail transportation, a saving on the non-transportation services obviously figures out the same as a rebate on the transportation service. It is immaterial that the shipper pays fair value or the market price for the extra-privilege he enjoys. Section 6(7) of the Act forbids the carrier to receive less than the published rates for transportation or to remit 'by any device any portion of the rates.' When services, not necessary for transportation, are furnished below cost, in an effort to acquire rail transportation, as was done here, this provision is violated. . . ."

In this case the Court found that by furnishing commercial warehouse services (non-transportation services) at less than cost the carriers were, in effect, making a concession from published freight rates, a clear violation of Section 6(7). It is less clear that the carriers violated Sections 2 and 3(1), but, it should be noted, the discrimination was in favor of *shippers* using the railroad-owned and railroad-operated warehouses.

same as a rebate on the transportation service." See also *Union Pacific v. United States*, 1941, 313 U.S. 450, 61 S.Ct. 1064, 85 L.Ed. 1453, a case under the Elkins Act, however, in which the carrier, operating a food terminal with a city, was required to charge rentals on the basis of the fair rental value of the facilities.[18] Emerging [770] from these cases "is the clear rule that rents railroads charge for facilities leased for the purpose of attracting freight must be no less than the prevailing market rents in the area".[*] Judge Lynne, in *Southern Railway Company v. United States*, 1960, 186 F. Supp. 29, 37.

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[18] In this case the Union Pacific joined with Kansas City, Kansas, to promote a food terminal with cold storage facilities. The food terminal formerly supplying the city was located in Kansas City, Missouri, and was served by several railroads. The Union Pacific was the only railroad in a position to serve the new market. To induce the merchants to move, the Union Pacific offered to make good losses and expenses caused by moving, take over leases, and give free rent, bonuses, and advertising. The district court enjoined the City and the Union Pacific from giving such concessions on the ground that it resulted in a lowering of the published tariffs and constituted rebates to the favored shipper in violation of the Elkins Act. The Supreme Court, affirming the district court said: "The statute specifically requires that the concession given or received shall be 'in respect to the transportation of any property in interstate or foreign commerce by any common carrier.' As the language of the section covers indisputably the carrier and the freight involved in movement into and out of a metropolitan terminal market, only the phrase 'in respect to the transportation' requires analysis. What has been said shows its meaning connotes more than discrimination in payment of tariffs. Offering or soliciting the concessions explicitly violates the section. . . . The concessions are none the less illegal, if made for non-transportation services, as long as they result in lowering directly or indirectly transportation costs to a shipper. . . . Where traffic is an object, and discriminatory advantage the means employed in attempting to obtain or actually obtaining it, there is a violation of the section in respect to transportation."

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[*] *The paragraph quoted reads in full:*

"Emerging from these cases is the clear rule that rents railroads charge for facilities leased for the purpose of attracting freight must be no less than the prevailing market rents in the area, and no less than compensatory, including the normal return on capital employed in like enterprises, whichever is

These cases are all distinguishable from a damage suit, for the reasons previously stated. However, they establish the principle, pertinent here, that for purposes of determining discrimination relating to transportation, a warehouseman, aggrieved by a carrier's favored treatment of a competing warehouseman, comes within the long protective reach of the Act—although he may not be a shipper and although the alleged discrimination itself is primarily of a non-transportation nature.

Consignment of freight to warehouses and the services performed in receiving, handling, storing, and delivering freight do relate to transporting goods in commerce. The question narrows then to whether: (1) the particular warehouseman in suit is so directly in the stream of transportation that he should be treated as a shipper on a competitive basis with actual shippers or with other warehousemen who must be treated as shippers; and (2) is also so similarly situated that he would be affected adversely by the carrier's favored treatment of a competitor. Pittwood's viability and lonely position as the unique precedent against a warehouseman's suit for damage are not inconsistent with these views. In Pittwood the injury was to a landowner whose real estate investment depreciated in value; the injury was not the result of discrimination with relation to transportation. The instant case is somewhere between Pittwood and McCormick.

The question is essentially a factual one that should be resolved by a jury. (1) Southern, however, makes a good case for its motion for a directed verdict. The concessions, if any, were in favor of tenants against non-tenants; not in favor of some users of the railroad against

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higher. A carrier is prohibited from engaging in such non-carrier business because it can offset any losses against carrier revenues. It cannot operate noncarrier business as a means of securing freight business free of the Commerce Act's required standards for carrier conduct.

other users in similar circumstances. And, a decline in rental value of warehousing property in downtown Birmingham was inevitable after Southern trebled available warehousing space in the city and put up a modern food terminal with cold and dry storage facilities.[38] It is not shown that Southern exerted any control over the rates or trade practices of the tenants.[39] There is no evidence that any customer, allegedly enticed to the Terminal by a tenant competitor, ever shipped or received anything by rail. None of the plaintiffs is a shipper, receiver, user, or customer of the railroad. **[771]** No shipper testified against Southern. The Terminal was constructed to attract a variety of businesses. For example, the Truck Growers, producing no freight traffic, occupied one-fourth of the total area. (2) But the plaintiffs have a story to tell, too. They were in competition with two of the Terminal's tenants. It is a fair inference that these competitors passed on to their customers the concessions the railroad made to them. One of the plaintiffs, Shaw Warehouse, operates two public dry storage warehouses in Birmingham, both of which are served exclusively by Southern. Mr. Shaw described his company as a "freight station." All of the plaintiffs operated businesses that were a part of the rail freight distribution system: each received and shipped for customers, advanced freight charges at times,

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[38] *This argument was rejected in* Baltimore & Ohio R. Co. v. United States, 20 F. Supp. 273, 278, (D.C. Md. 1938), affirmed 305 U.S. 507 (1939), *where the Court stated:*

> *"It is no answer to the violations of the Statute to say that as the railroad has a losing piece of property on its hands which it has acquired in good faith it should be permitted to rent it for its fair value. That is true only so doing does not violate the law. While it may lawfully minimize its losses from bad investments it may not give concessions to a favorite shipper."*

[39] *The practices were certainly made known to Southern when attacked in the Commission in July 1957.* (R. 87) *Their continuation was made possible only by Southern's continued failure to collect rent.* (R. 24-26, 1100-1101).

and handled in-transit shipments, stopover cars, and pool cars.

The Court is unwilling to say, as a matter of law, that a warehouse company cannot recover damages for unjust discrimination unless it is a shipper or user of the rail road, or that, in this case, the evidence shows beyond a reasonable doubt the plaintiffs were not injured by discrimination with respect to transportation. We prefer to err, if it be error, on the side of carrying out the broad policy of the Act of eliminating concessions by a railroad of any kind, direct or indirect, to the end that persons in the stream of transportation may carry on their business on an equal basis with their competitors: "The Interstate Commerce Act . . . uses language of the broadest type to bar discriminations of all kinds." *Boynton v. Virginia*, 1960, 29 L.W. 4049. That policy requires us to narrow, not widen, a carrier's escape hatch from liability for violation of the anti-concessions provisions of the Interstate Commerce Act. We hold then that it is a question of fact for the jury whether, in the circumstances of the case, the injury to the plaintiffs, if any, was caused by unjust discrimination in relation to transportation. This type of case requires the trier of facts to sift involved facts and contradictory inferences. It is a case a jury is peculiarly fitted to decide.

III.

The first major issue put to the jury was whether, "in view of all the circumstances" the Terminal rents were "less than a fair rental". The Court defined a fair rental as "the fair market rental" and also as "a compensatory rental" yielding a fair return on capital. In his instructions, the trial judge made it clear that there is nothing necessarily improper in a carrier's ownership and operation of a terminal; a carrier's furnishing of facilities or services to shippers or to persons assimilable to shippers

may violate the Act only if the facilities or services are furnished at such rates as to amount to an undue concession or discrimination. The issue comprises several subissues. One of the most important concerns depreciation.

The record shows that the prevailing practice in Birmingham was to figure rent on the basis of eight per cent of the value of the land and ten per cent of the value of construction costs and certain other expenses. The record is not so clear as to the applicability of this rule of thumb, regardless of time, place, and type of property. All the witnesses agreed, however, that the only reason for a rental rate greater than eight per cent was the element of depreciation. Southern used eight per cent as the rental factor on construction costs. Should Southern have included depreciation in its rental formula? Was the trial court correct in instructing the jury that if Southern and the tenants intended at all times to revert to the original sales plan, the element of depreciation should not be included in determining the adequacy of the rents?

Southern did not work depreciation into the rents and the trial judge charged as he did, because the original agreement between Southern and the tenant-purchasers was that the property and facilities would be purchased at undepreciated cost, the rentals paid in the [772] interim *not* to be credited to the purchase price. The "Round Robin Agreement" of October 18, 1955, also bound the tenants to purchase. There is nothing in the record to show that the tenants are not ready, willing, and able

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[fn] The record showed explicitly the financial insolvency of both competitor companies. (R. 1100-1103, R. 24-26); both had surrendered all interest in the Terminal facilities almost two years prior to the date of trial, their businesses were transferred to Jefferson Warehouse and Cold Storage Company in 1958, the rents owed by these companies have never been paid; Southern agreed that Jefferson Company would not be required to pay them. (R. 637, 640-641, 645, 654-655).

to go through with the purchase if, according to the agreement, the original sale plan is determined by proper public authority to be valid.

The plaintiffs' theory is that the charge was erroneous, even if eventually the property would be purchased at the undepreciated cost, because the rent would result in the indirect loan, without interest, of the depreciation—until the sale occurred. As a result, they argue, the carrier unlawfully furnished working capital to the tenants.

The argument carries a little aroma of plausibility. Depreciation, however, should not be reified. It is not a tangible thing that can be given or received. Depreciation is an assumed decline in value, or loss, attributable to wear and tear, taken into consideration for various purposes, with the hope that the owner can restore his capital asset at the end of its estimated life by amortizing its cost over its life span. The plaintiffs' theory would allow Southern to recover the depreciation twice, once in the sale and a second time by including the element of depreciation in computing the cost-base for rentals.[dd]

The trial judge instructed the jury that if it found the Terminal's tenants did not intend to purchase the property, the jury should consider depreciation in deciding the adequacy of the rents. Several times, once in response to a question from a juror "about the compensatory part", the trial judge carefully stated that question for the jury: "Were the rents charged the tenants less than the fair market rent or less than compensatory rent." So stated, the instruction is favorable to the plaintiffs. It is not contended that the rents were

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[dd] *Petitioners would not require the recovery of depreciation twice; they do seek damages for injuries which resulted from Southern's failure to collect even once. See Counsels' note cc, supra.*

below cost,* but only that Southern furnished facilities at less than a compensatory return on the full value of the facilities. We consider that fair rental value, that is "fair market rent", rather than a compensatory return is the proper standard at least in this type of action, because the suit rests on a claim for damages caused by destructive competition. There is authority, however, that even in an I.C.C. proceeding the "cost of facility is only persuasive". *Union Pacific Railroad Co. v. United States*, 1941, 313 U.S. 450, 61 S.Ct. 1064, 85 L.Ed. 1453. As we read the record, and considering the warehouse space in the Birmingham area, the jury could have concluded that the plaintiffs failed to show that it was economically feasible for Southern or for the warehousemen to obtain tenants willing to pay rent that would yield ten per cent on warehouse buildings. This Court must assume that if the jury found it necessary to consider depreciation, it found that the rents were not only at the market value but yielded a compensatory return.

B. The warehousemen level a broadside at the purchase price as an illegal concession, charging that by omitting certain proper cost items Southern would allow the tenants to purchase at less than cost and, in the meantime, the tenants are paying rents (based on the purchase price) that are too low.[19] These items include: (1) the value of the land in excess of $2500 an acre, (2) cost of removing tracks and demolishing existing structures, (3) cost of installing service tracks, (4) cost of paving areas,

[19] See footnote 9.

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* *This is not true. Petitioners have consistently so maintained: Southern's rental operating costs exceeded $2,000,000 for the period during which Southern collected from the entire Terminal only a little over $800,000 in rent, and charged off, for tax purposes, almost $1,000,000 in depreciation alone.* (R. 36, 760, 121-125) *During this period over $250,000 accrued in back rents owed by Petitioners' primary competitors were never collected at all.*

(5) cost of grading and levelling areas to be used for building construction, expansion areas, and driveways, (6) value of land for tracks and vehicular areas. There is a great mass of conflicting evidence on the items alleged to have been improperly omitted.[**] Southern produced witnesses who testified[**] that: (1) the value of land did not exceed $2500 an acre; (2) the cost of removing tracks and razing old buildings would have been incurred without construction of the Terminal and are not an includible item **[773]** in determining the cost-base; (3) some of the tracks were adjacent to the Jefferson County Truck Growers Association (neither a shipper nor receiver of freight by rail), some were not in the Terminal area, some were for public loading and unloading, some will be retained by Southern for future expansion; (4) paving costs, except for track areas, were included in the rent base and proposed purchase price; (5) the grading entailed merely excavating the land and spreading it, without any substantial enhancement in the value of the property. In final analysis the propriety of Southern's including these items in fixing rentals and the weight to be attached to any one or more of these items were questions for the jury.

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[*] *The fact of the omission of each of these items was proved not by a mass of conflicting evidence, but by Southern's own sworn answer to requested admission 16(d).* (R. 111-112).

[**] *Southern produced no witnesses on any of the numbered items listed in the opinion except with respect to the value of land. Such witnesses did appear before the Interstate Commerce Commission which rejected their testimony. Southern's appraiser testified that the tracks increased the value of buildings* (R. 716); *no witness explained the exclusion of over $80,000 paving costs* (*Compare* R. 539 *with* R. 1036, *See* R. 708); *no witness explained why no part of the over $400,000 grading costs was added to Southern's land charge of only $190,215.* (R. 13, 15, 535-537, 1036. *See* R. 18, 945); *Southern's agreement to exclude grading costs occurred between March 1955, when the proposal was to add all grading costs to the land price* (R. 944-946), *and August 1955, when this cost was entirely absorbed by Southern* (R. 11, 18). (*See* Shaw Warehouse Co. v. Southern R. Co., 308 I.C.C. 609 at 630).

C. The original purchase plan contemplated Southern's transfer of 85 acres for $212,500 on a 25-year 4% second mortgage with no payments on principal until the end of the term. In addition, Southern was to spend $355,000 secured by a similar mortgage with the requirement that the principal be paid during the 25-year term. And, Southern guaranteed 90 per cent[hh] of the first mortgage obligation. Appellants assail the purpose and terms of these mortgages and the guarantee: their purpose—to make it unnecessary for the tenants to use working capital; their terms—lower than the prevailing market terms. Southern justifies the plan as a means of protecting itself, in the event the Terminal project failed. There is no question of the importance to a railroad of the land adjacent to its lines. Such property has strategic traffic-produced potentiality and is vital for any possible future construction of new lines. The explanation is for the jury.[ii]

D. The final paragraph of the charge summarizes the issue and puts the question squarely to the jury:

> "When new facilities are constructed by a railroad and rented to tenants whose business includes the shipment or receipt of rail freight as owners or as consignees or consignors the total rental charged must not be less than an amount which will fully cover a fair return on that plus taxes, insurance, depreciation and maintenance and no such new construction should be undertaken unless there is assurance with all reasonable certainty that such rentals can and will be collected. (And that's to be taken in connection with

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[hh] *Southern was to guarantee 100% of the first mortgage bonds* (R. 91, 97).

[ii] *The question of the legality of the guarantee was not even submitted to the jury; the trial court charged the jury that there was nothing wrong with the guarantee* (R. 796).

my previous instruction to you that if it is intended that the purchase plan be carried out you would strike from that the factor of depreciation in computing a compensatory rental.)"

This part of the charge is based directly on Practices of Carriers—Packing Sheds, 1941, 246 I.C.C. 273, 283. The appellants requested the charge, except the portion in parentheses. In deciding the first major issue, the jury had to sift uncertain and fluctuating variables in the concept of a "fair return", as well as to weigh contradictory testimony and inferences. Taking the record as a whole, substantial evidence supports the jury's finding.

IV.

The second major issue submitted to the jury dealt with the collection of rent from the tenants.

A. The district judge charged the jury: "Did the Southern Railroad, in view of all the circumstances disclosed by the evidence, exercise due deligence in collecting the rent charged?" The appellants excepted to the charge on two grounds: (1) "due diligence" is not the test; (2) unqualified and undefined, as it was in the charge, the "due diligence" test permitted the jury to speculate and consider immaterial facts.

A carrier by failing to collect its charges extends credit, thereby unlawfully furnishing working capital to a debtor, shipper or tenant. Thus, when a railroad extended four months' credit to a shipper on freight bills, the court considered the extension an undue concession because it was equivalent to the carrier's lending the shipper money at [774] no interest. *Hocking Valley RR. Co. v. United States*, 6 Cir., 1914, 210 F. 735, cert. den. 234 U.S. 757, 34 S.Ct. 675, 58 L.Ed. 1579. The statutory test, however, is one of reasonableness. The Act condemns "undue or un-

reasonable" concessions.[jj] In the Hocking Valley cases, there was no evidence of due diligence by the carrier; the indictment charged that the carrier made no demand for payment and made no effort to collect the debt. The court stated the problem as one depending on the facts of the case:

> "We do not say that all credit or forbearance is discrimination. A practice by which those shippers or consignees who had established their financial credit and satisfactory business habits were suffered to delay payment until convenient, but frequent, settlement periods, while others were required to pay cash on delivery, might not be, of itself, forbidden. Delays caused by inability to collect or an extension of time given as the best means of treating a past-due and doubtful freight account, might be justified. These thoughts do not reach a case where it was agreed before shipment that the favored should have the incidental delays and forbearance customarily given to all shippers, and should then, in addition, receive a considerable further extension of credit while cash payment was then to be collected from all others." 210 F. at 744.[kk]

In view of the language of the statute prohibiting *undue* concessions, the charge properly instructed the jury to

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[jj] *See Counsels' note a, supra. Petitioners have consistently contended that the Interstate Commerce Act condemns outright any rental practice which has the practical effect of continuously enabling the tenant to do business on the capital of a railroad.*

[kk] *The original lease was an advance agreement to postpone recovery of depreciation costs until a future uncertain purchase was made at an undepreciated cost price. See Appendix E. A year after its original occupancy Southern agreed to postpone for another six months Nelson Company's first 6 months' rent by the acceptance of a note for over $20,000; this note was not paid when due, and remained uncollected at the time of trial. (R. 1025-1026, 1102-1103). In April 1958 Southern entered into a further agreement to postpone collections of part of all rent. See counsels' note k, supra.*

consider whether the defendants exercised *due* diligence in collecting the rent. Appellants do not suggest, here or in their requested charges, that the law imposed a higher degree of duty on the carrier.

When a trial judge instructs a jury in plain language, using common words to express a clear thought, he is under no duty to paint the lily. An unnecessary definition or useless qualification is more likely to obscure than to clarify. Here, the only possibility of the jury's misunderstanding was eliminated by the court's further charge restricting "all of the circumstances disclosed by the evidence" to "every circumstance that bears on that issue, fail[ure] to exercise due diligence to collect the rent". The question of eliminating certain circumstances or issues from the jury's consideration could be raised, and was raised below, by the defendants' requested charges. The trial judge properly charged the jury.

B. There is considerable evidence in support of the plaintiff's position. Some of the tenants, including tenants not competitors of the plaintiffs, had poor credit ratings and were thinly capitalized corporations. Nelson Company, one of the plaintiffs' direct competitors, had a net capital of only $4,000 and paid[mm] a monthly rental of $7,760 for cold storage warehouse facilities expected to cost $1,000,000 that finally cost $1,400,000. The company was sent no rent bill for ten months. When the first six months' rent was long overdue, Southern, in effect, postponed payment for another six months by taking a note for the rent. It was never paid. The company was sued for arrearages of $135,000. While at the Terminal its revenues amounted to $242,000 in 1957 and

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[ll] *See Counsels' note jj, supra.*

[mm] *Nelson Company never paid but two months rent and that was at a reduced figure* (R. 1102).

$293,000 in 1958. Operating losses mounted, but Nelson increased officers' salaries, paid off back salaries to its president, and offered free services in handling the delivery of goods. Nelson was expected to produce 2500 carloads of freight a year. Birmingham Terminal Cold Storage, the other direct competitor of the plaintiffs, was usually six months in arrears, operated on a profit for only two months, and when it left the Terminal, was $65,000 in arrears for rent. The facilities constructed for these two companies were leased to a newly formed corporation, the Jefferson Company, owned by a man who had under lease similar facilities in Chattanooga, Tennessee. At the time he took over the space in the Birmingham [775] Terminal, he owed from $65,000 to $98,000 on his Chattanooga lease.

The jury heard all of this. It heard that Nelson moved in fourteen months before the Terminal was completed; that the president of the company was ill for four months.[ss] It heard that a bona fide dispute between the Terminal and all of its tenants as to the rental-sale cost-base held up collections at the start and impeded collections until settled by a suit for a declaratory judgment.[tt] It heard too that Nelson Company had a "good" credit rating;[uu] that the operator of the Birmingham Cold Storage Company had a "good" credit rating and had developed a

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[ss] *At the time of such illness the company was already over 12 months in arrears in its rent* (R. 1024-1026).

[tt] *There had been no such declaratory judgment. The matter has not been set for trial until April 23, 1962. See Counsels' note f, supra.*

[uu] *The Dun & Bradstreet credit rating of Thomas N. Nelson & Company in 1955 was "D 2-(new)-35,000-50,000-Good; 2X to D 2-(old)-75,000-500,000 annual sales"* (R. 957). *In September 1955 it had a total capital of $4,422.36; in May 31, 1956 when it entered its premises under an agreement to pay a rental of $7,758.97, its total capital was $3,404.96* (R. 991, 1100, 1102).

prosperous cold storage business in Gadsden, Alabama.[ss] Prompt eviction is not necessarily the best way to collect rent. There is evidence that Southern made reasonable efforts to collect the rentals, sent out bills promptly after the dispute with the tenants was settled,[tt] took a note from the president of Nelson Company to aid, not impede,[uu] collection of the rent, and made other efforts to collect—short of eviction. Southern, according to its evidence, exercised a reasonable business discretion, then when the efforts to collect proved fruitless, Southern required Nelson and The Birmingham Terminal Cold Storage to vacate the premises, and filed suit for rent arrearages.[vv] There is no evidence in the record that Southern had any agreement or understanding with any tenant that rents were not to be paid or that rents might be delayed.[ww]

We cannot say, as a matter of law, that the failure to collect rentals was so lacking in diligence that it constituted a violation of the Act. The trial judge properly submitted the question to the jury. Sufficient evidence supports the jury's verdict.

V

"A cause of action does not necessarily arise from those acts and omissions of a common carrier that may subject it to a criminal prosecution by the government, or to corrective and coercive proceedings at the instance of

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[ss] *Thompson Bonding Cold Storage had a Dun & Bradstreet credit rating of D 2-35,000-50,000 good* (R. 957), *but the rental agreement was made, not with this partnership, but with Birmingham Terminal Cold Storage Company, a new corporation with only $1,000 paid-in capital* (R. 980, 41).

[tt] *See Counsels' notes q, cc and oo, supra.*

[uu] *See Counsels' note rr, supra.*

[vv] *See Counsels' notes m and n, supra.*

[ww] *See Counsels' notes rr and p, supra.*

the Commission." *Pennsylvania R.R. Co. v. International Coal Mining Co.*, 1913, 230 U.S. 184, 33 S.Ct. 893, 57 L.Ed. 1446. To recover damages in private litigation, the plaintiff must prove a specific injury resulting from the carrier's acts and omissions.

A. In this case the evidence showing the causal connection between Southern's rental practices and the plaintiffs' loss of business is thin.[v] There is no direct evidence that Southern controlled the rates and business practices of the plaintiffs' competitors at the Terminal, or that these rates and business practices (not honest competition) were the cause of plaintiff's alleged loss.

Boggs, a company in the cold storage since 1948, contends that the Terminal forced it out of this business; it is now in the brokerage business. But Boggs was losing customers to other warehouses than the Terminal before the Terminal began in business. It is not shown that any particular customer left Boggs because of reduced rates or other attractions offered by tenant-competitors at the Terminal. At least one former customer of Boggs said that he was forced to withdraw because of "prohibitive rates."[vv]

Since 1927 Shaw has operated a public dry storage warehouse business, stored food and other products, and maintained rental offices for food brokers. Shaw has two warehouses served by Southern. It is far from clear that Shaw showed any injury or loss of business during the relevant years. Mr. Shaw testified that Nelson solicited his customers and offered them free delivery and air conditioned offices, but the record does not show that Nelson's

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[v] *See Counsels' note d. supra.*

[vv] *Evidence was introduced showing direct transfer of accounts from Boggs Company to Terminal tenants* (R. 1046-1053); *the exact amount of rate reductions was expressly set out* (R. 1113),

solicitations induced any customers to leave. Mr. Shaw testified that he lost three customers. Two went to other warehouses than the Terminal's; and the third was only a potential customer. Operating income rose from $202,000 in 1955 to $346,000 in 1958.[35] During the time when competition with the Terminal was greatest, the company [776] increased the president's salary from $13,000 to $24,700. In 1955 Shaw Warehouse doubled its storage by constructing an addition to its main building that added 35,000 square feet of storage space. In 1957 Shaw Warehouse leased buildings in Birmingham containing additional space. The company has consistently operated at a profit.

Birmingham Ice, founded in 1881, has operated a public cold storage business since 1915. Birmingham Ice supports its case somewhat better than the other plaintiffs. Its cold storage department operated at a profit in 1955 and 1956 but at a loss in 1957 and 1958. Still, Birmingham Ice was doing well enough to increase the salary of its president from $21,800 in 1956 to $26,000 in 1958; and, in 1957 its president found that he could devote one-fourth of his time to a new business. Birmingham Ice contended that it lost all or part of twenty accounts.

None of the plaintiffs' customers, allegedly lost to a Terminal tenant, was called to tell why he had changed warehouses. Mr. Nelson was not called on to testify.

Southern argues that the plaintiffs operated multi-story structures that were obsolescent;[36] that whatever advan-

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[35] *The figures given represent an increase in gross revenue produced by a substantial expansion of facilities; Shaw actually suffered substantial loss of profits from forced rate and office rent reductions as it will prove in a trial on the issue of damages.* (R. 262, 268-269).

[36] *Birmingham Ice did operate a multi-story structure which had been consistently modernized until the company suffered from the*

tages Terminal tenants enjoyed were because of the efficiency of the facility and not because of any concessions. Representatives of the complainant warehouses attended the first meetings of the group organizing the Terminal." There is evidence that as early as 1954 Mr. Shaw objected, he said, "to the very thought" of the Terminal; that in 1955 the head of Birmingham Ice sought to dissuade Southern from promoting the project on the ground that there was enough cold storage business in Birmingham only for his company and Boggs. A jury might infer that "the Birmingham warehousemen naturally did not relish facing the chill wind of this competition;"[20] that the plaintiffs' losses resulted solely from the construction of the Terminal and not the carrier's unlawful rental practices. Or, the jury might infer that Southern kept its warehouse tenants in business to prey on the plaintiffs' accounts. It is not for us to choose between these inferences. On the record, even assuming that the defendants violated the Act, there is sufficient evidence to support the verdict on the basis that Shaw failed to prove any injury and that none of the plaintiffs successfully carried the burden of proving that the defendants' violations of the Act caused the plaintiffs' business losses.[xv]

B. The district court charged the jury that to sustain the burden of proof the plaintiffs were required to prove that their losses were "the direct result of some wrongful

[20] This is the language of Commissioner Webb, dissenting, in Shaw Warehouse v. Southern Railway Co., 1959, 308 I.C.C. 609, 640.

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impact of the railroad subsidized competition complained of (R. 389), *but Boggs Company and Shaw Company operated almost new one-story modern structures built with funds borrowed at market rates under market loans with market requirements of repayment* (R. 174-175, 263-265).

[xx] *See Counsels' note j, supra.*

[xv] *See Counsels' note d, supra.*

act of the defendant"; that the concessions must have been "the direct cause of some injury to the plaintiffs." This, they say, placed a higher burden of proof on the plaintiffs than the statute required. As they see it, they are entitled to all damages, direct, indirect, or consequential, flowing from unlawful railroad practices.

The Act uses the language "damages in consequence of any such violation." 49 USCA §8. In Pittwood, the Commission held for the carrier, stating that the warehouseman's damages "were not the direct and proximate consequences . . . ." In Terminal Warehouse Co., 31 F.2d 951 the court noted that in the I.C.C. proceeding (finally approved in Merchants Warehouse Co., 203 U.S. 501, 506) the Commission refused an award of reparation, stating that the loss was not attributable directly to the alleged unlawful practices. In *Pennsylvania RR. v. International Mining Co.*, 1913, 230 U.S. 184, 33 S.Ct. 893, 57 L.Ed. 1446, the Court said that the right to recover is "limited to the pecuniary loss suffered and proved"; in *Keogh v. Chicago & N.W. Ry.*, 1922, 260 U.S. 156, 43 S.Ct. 47, 67 L.Ed. 183, the Court, referring to the damages recoverable under [777] Section 8 of the Commerce Act, pointed out that "these damages must be proved by facts from which their existence is logically and legally inferrable"; and in *Story Parchment Co. v. Peterson Parchment Paper Co.*, 1921, 282 U.S. 555, 51 S.Ct. 248, 75 L.Ed. 544, the Court held that "it was open to the jury to find that the price cutting and the resulting lower prices were *directly* attributable to the unlawful combination."

The trial below was on the issue of liability only. The plaintiffs were spared the necessity of proving specific pecuniary loss and distinguished between what

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[vv] *See Counsels' noted supra.*

was a direct loss and what was an indirect loss. The trial judge instructed the jury it was not to burden itself with "how much damage or injury was sustained by each plaintiff, but only as to whether the evidence satisfies your mind that at least some injury or damage resulted to each plaintiff as a result of a violation" of the Act. This instruction is broad enough for the jury to find that the injury was in market losses of customers and profits. We think that the statutory clause, "damages in consequence of any such violations" means damages that are "the direct result" of such violations. But considering the charges as a whole, the trial court made it plain to the jury that the plaintiffs need show only that "some injury or damage resulted" from the defendants' violations of the Act. This was as favorable an instruction as the plaintiffs could expect.

VI.

Appellants complain bitterly that the trial court permitted Southern's attorneys to engage in improper arguments, addressed to class hatred, that reached "the very nadir of irradicable prejudice". They say that throughout the trial opposing counsel misled the jury by picturing the railroad as the friend and champion of the poor against the warehousemen, pictured as rich and powerful exploiters of the defenseless. This, we may assume, must have taken a little doing—and, an unusual jury. Appellants particularly object to the argument to the jury that the president of the Birmingham Ice and Cold Storage Company was as callous of poor struggling housewives as was Marie Antoinette. Southern's counsel equated testimony that warehouse prices affected food prices "[a] penny a pound" with the well known eighteenth century remark, "let them eat cake". Aside from the error of counsel in attributing the remark to Marie

Antoinette, a common mistake,[21] there was no other error. At least, there was no reversible error. The trial below was a long hard-fought battle in one of a number of wars between the parties. The record reads as if the case were an anti-trust suit. Able counsel for both sides relied on a sort of economic argumentum ad misericordium. We do not endorse this argument nor the allusion to Marie Antoinette. However, the latitude allowed lawyers in cross-examination and in argument to a jury, and the conduct of a trial generally, must rest in the sound discretion of the trial judge. The district judge was scrupulously fair. We find no impropriety the trial judge inferentially approved, in abuse of his judicial discretion. Even considering the total effect of all the allegedly improper statements, we find no impropriety of such proportions as to require reversal and remand of the case.

Judgment is Affirmed.

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[21] Evans, Spoor of Spooks 63 (1954); Stevenson, Book of Proverbs, Maxims, and Familiar Phrases 274(5) (1948).

APPENDIX C.

ON PETITION FOR REHEARING.

No. 18138

SHAW WAREHOUSE COMPANY, ET AL.,

versus

SOUTHERN RAILWAY COMPANY, ET AL.

United States Court of Appeals for the Fifth Circuit.

(September 29, 1961)

294 F.2d 850

[851]

Before Hutcheson, Brown and Wisdom, Circuit Judges.*

Wisdom, Circuit Judge: The Court has considered carefully the appellants' application for a rehearing.

I.

The appellant warehouse companies argue that there is a direct conflict in statutory construction between this Court's opinion in the instant case, 288 F. 2d 759, and the opinion of the three-judge court in Southern Railway Co. v. United States, 186 F. Supp. 29. The latter decision affirmed the ruling of the Interstate Commerce Commission that Southern's rental practices at the Birmingham Food Ter-

* Footnotes in Italics are those of counsel.

minal were unlawful under Sections 2, 3 (1) and 6 (7) of the Commerce Act. While the Commission's decision was not reached until after the trial below, both the Commission's decision and the appeal taken by Southern became final before this appeal was decided. Appellants contend that the three-judge court, speaking through Judge Seybourn Lynne, decided the major issues in this appeal and that this Court's decision creates irreconcilable conflicts in the law applicable to the Birmingham Food Terminal.

The Commission stated in its opinion in *Shaw Warehouse Co. v. Southern Railway Co.*, 308 I. C. C. 602, 611 (1959): "The Commission is the guardian of the general public interest, and proceedings before it are not in the nature of private litigation, but are matters of public concern in which the whole body of shippers and carriers is interested." In the three-judge case Southern Railway contended that the judgments entered in the instant suit, then pending on appeal, were *res judicata* of the Commission's order. Judge Lynne, for the court, held: "[R]egardless of the outcome of such appeals, the appropriate conditions for application of the doctrine of *res judicata*, are not present. The parties are not even the same.[a] The success or failure of private litigation cannot have the effect to bar or stay the power of the Comission to act in a public proceeding such as that before the Commission under the Shaw Company complaint. See Land v. Dollar, 1947, 330 U. S. 731, 67 S. Ct. 1009, 91 L. Ed. 1209." *South-*

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[a] *In the cases below by Shaw Company and Birmingham Ice all parties in the suits below were also parties before the Commission and before the Three-Judge Court. Furthermore, after the Commission decision was made "every other shipper similarly situated was entitled by appropriate proceedings before the Commission or the courts to obtain the benefit of that general finding or order."* A. J. Phillips Co. v. Grand Trunk W. R. Co., 236 U. S. 662, 668 (1915). *See* National Pole v. Chicago & N. W. R. Co., 211 Fed. 65 (7th Cir., 1914); Mitchell Coal & L. Co. v. Pa. R. Co., 230 U. S. 247, 257-258 (1913). *Cf.* Terminal Warehouse Co. v. Pennsylvania R. Co., 297 U. S. 500, 508 (1936).

ern Railway Company v. United States, 1960, 186 F. Supp. 29, 41.[3]

Judge Lynne was thoroughly familiar with the litigation and any possible conflicts. He was the district judge who presided at the trial of this case below. At that time he had the full benefit of the Commission's lengthy opinion.[4] Proceedings before a public agency and proceedings in a private suit for damages are different in objectives, breadth of approach, and issues. Not the construction of the Commerce Act but the application of the Act is different.[5] Once over the hurdle of the motions to dismiss, this case was a factual one for the jury to decide. The jury had before it considerable evidence not contained in record of the Commission's proceedings. And, the important questions of causation and injury, which may have been crucial **[852]** in the minds of the jurors, were not present in the I. C. C. proceedings.

Shaw Warehouse Company initiated the proceeding before the Commission; Boggs Cold Storage Company and Birmingham Ice and Cold Storage Company intervened. Under the Act, the warehouse companies could seek damages and other relief from the Commission. Instead, they elected to sue for damages in the district court. The jury

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[3] *Judge Lynne's opinion continued:*

Furthermore, although such judgments were entered in June, 1950, over six months prior to the Commission's decision and order, no claim of res judicata was made before the Commission and none was included in plaintiff's petition for reconsideration filed in November, 1950. Since the issue was not presented to the agency, it cannot properly be raised in this proceeding. United States v. L. A. Tucker Truck Lines, 1952, 344 U.S. 33, 73 S.Ct. 67, 97 L.Ed. 54.

[4] *The trial below was held in May 1950. The Commission's decision was handed down October 6, 1950.*

[5] *Petitioners believe that the policy of uniform construction of the Commerce Act applies as much in a suit for damages as it does in any other proceeding designed to enforce the Commerce Act.*

held against them in that forum. We are still unimpressed with the argument that we should reverse the verdict in the forum below on the strength of a finding in a different kind of proceeding in another forum.

In the original briefs appellants argued, that "the regulatory agency decision should be given special weight in these appeals." At that time the three-judge case had not been decided. We have given "great weight" to the opinions of the Commission and Judge Lynne. Still we must decide this case on the record before us and in the light of the law as we read it.

II.

Judge Lynne, the hero of appellants first argument, is, along with this Court, the villain of their second argument: that the trial judge erred in allowing counsel for the Southern Railway to engage in prejudicial remarks and cross-examination allegedly picturing Southern Railway as the friend and champion of the poor and defenseless against the warehouse companies, rich and powerful exploiters of the less fortunate. This argument, originally made with some moderation on behalf of all the appellants in the original hearing, is now urged only by counsel for Shaw Warehouse Company and Boggs Cold Storage Company in a supplemental petition and brief on rehearing.

Another reading of the record confirms our view that Judge Lynne did not abuse his discretion as a trial judge in controlling the attorneys' argument and cross-examination. Judge Lynne is an able, experienced district judge whose record is beyond criticism. After the trial below, when he attempted to recuse himself from serving on the three-judge court, by agreement of all of the parties he consented to serve.

As stated in our original opinion, we do not endorse improper arguments such as the allusions to Marie Antoinette,

but we find no reversible error. It is hard to say which litigant is the pot and whence it started calling the kettle black. Southern says, for example, that counsel for Boggs and Birmingham Cold Storage was the first to make the housewife an issue. Considering the length of the trial and the intensity of the feelings engendered by the trial and events preceding it, we think that the lapses were relatively few; their probable effect must be weighed against the total effect of the case on the jury. The record as a whole reflects great credit on the ability and judgment of the district court in keeping the lawyers within the bounds of propriety.

III.

The application for rehearing raises points of law the Court considered in the writing of the original opinion. One of these points, however, should be clarified.

Appellants contend that the Court makes a warehouseman's status as a shipper an issue of fact when it is an issue of law. Appellants over-simplify the question in stating it in terms of a warehouse company being a "person" within the meaning of Sections 2, 3 (1) and 6 (7) of the Commerce Act and of a warehouseman being a "shipper" as a matter of law. As pointed out in the opinion, there is no doubt that warehouse companies are persons within the Act and that they have standing before the Commission as shippers. What they must prove in an action to recover damages is a different matter. The Commerce Act has reached the ripe old age of seventy-five years. During that time there has been only one action for damages comparable to the instant case. [853] *Pittwood v. Northern Pacific Ry. Co.*, 1918, 51 I. C. C. 535. In Pittwood the Commission held: "A warehouse owner, a landlord seeking to rent his property, as such, has no relation with a common carrier which could result in a discrimination against him

in violation of the Act to regulate commerce.' The discrimination there forbidden is in respect of transportation."

We said in our opinion that Pittwood might be distinguished on the ground: "In Pittwood the injury was to a landowner whose real estate investment depreciated in value; the injury was not the result of discrimination with relation to transportation." Judge Lynne made the same distinction in *Southern Railway v. United States*, 1960, 186 F. Supp. 29, 42, indicating thereby that he too considered that not every warehouseman must be treated as a shipper. The discrimination must relate to transportation. Here, if the evidence had shown beyond a reasonable doubt that the appellants were in fact complaining only because the advent of a competitor had produced a decline in rental value of warehousing property in downtown Birmingham, and not because of a discrimination relating to transportation, we would have held that the court erred in not directing a verdict for Southern.

The trial judge did not present this issue to the jury, perhaps because, as appellants suggest, he considered that the matter was settled as one of law. We consider the question essentially a factual one or a mixed question of fact and law. In any event, the trial judge properly overruled appellee's motions to dismiss and for a directed verdict and appellants have no cause for complaint.

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* At 186 F. Supp. 29, 42 the following statement was made with respect to the Pittwood and Fireproof Storage Co. cases:

"The holding in these cases was that the mere owner of property capable of being used as a warehouse on a railroad had no standing to complain of railroad rental practices affecting the value of his property. Neither case was appealed and the result reached in each of them may be inconsistent with the Supreme Court's apparent holding in Barringer v. United States, 1943, 319 U.S. 1, 13, 63 S. Ct. 987, 87 L. Ed. 1171, that the protection of Section 3(1) of the Act extends to every person affected by violations of its prohibitions regardless of his relationship to transportation."

We have considered all of the other points raised in the briefs on rehearing. We find it unnecessary to discuss these points. The petition for rehearing is

Denied.

Brown, Circuit Judge, Dissenting:

The Petition for Rehearing and more mature reflection convince me that our prior decision was wrong. I must therefore dissent from a refusal to reverse this judgment.

I do it on the fundamental basis that two courts, both within this Circuit, and, as it now turns out, composed of a like number of Circuit Judges of this Circuit,[1] have reached diametrically opposite results on several identical, critical issues.

Of course I am not so naive as to think, or even hope that, in today's multi-partied, multi-state, multi-form litigation there must always be symmetry and uniformity. But this is no railroad crossing accident case in which each of three injured passengers, each with his own separate suit, must take the risk that as many different juries will reach a like number of results and which, all the while, leaves the railroad in bewilderment as to just what it would have taken to satisfy the plaintiffs and the juries in how the train ought to have been run.

Here we have one railroad. We have one cold storage terminal. We have one group of competitor complainants. We have one undisputed lease arrangement evidenced by one set of writings between railroad and tenants. We have one rental basis producing one rental figure. We

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[1] The 3-Judge Court, affirming the ICC Order, was composed of Circuit Judge TUTTLE and RIVES and District Judge LYNNE. Southern Railway Company v. United States, N. D. Ala., 1960, 186 F. Supp. 20. In views of my dissent, my Brothers HUTCHESON and WISDOM likewise number two.

have the identical nonpayment of rent by the tenants and identical inaction by the railroad in the effective collection of rent or eviction of delinquent tenants. More than that, we have a single statutory policy condemning any type or kind of discriminatory rebate or favoritism by a railroad.

Yet this single railroad is authoritatively told by two parallel tribunals that this single lease is (1) illegal and must be terminated because (a) the rental [854] basis is inadequate and (b) the rents have not been diligently collected; but also that (2) a jury is entitled to determine whether (a) the rental basis is inadequate or (b) rents have been diligently collected.

No one but a lawyer, or lawyer-turned judge, could begin to understand how this could be. And, I submit, it is even too much for the legal mind which has, to be sure, been affected by its preoccupying fetish with the ram-of-the-mill notion of every suit as a "separate controversy." When dealing with such matters of transcendent public importance as this one case in two forums presents, this approach is a luxury which we can ill afford. That it poses some troublesome conceptual phases and cannot, for example, be readily disposed of on traditional notions of res judicata, collateral estoppel, or the like,[2] does not justify either the result or the despair that, bad as the result is, there is nothing that can be done about it so long as we follow a system that each case stands on its own—not only stands on its own but ends in divergent results since each tribunal must determine for itself what is the law and what it is that the law compels.

[2] The 3-judge case, decided while the appeal was pending undetermined by us, rejected the Railroad's contention that its jury verdict victory in the damage suit was res judicata as to the ICC order. 186 F. Supp. 41.

We returned the compliment when we rejected a similar contention by the damage suit plaintiffs that affirmance of the ICC order was a binding declaration of illegal practices by the Railroad. 288 F. 2d 761, note 5.

Before briefly pointing out some of these specific but critical divergencies, I should make clear that I accept the proposition that the suit for damages is different from the administrative ICC proceeding. It is different precisely in that the plaintiffs have a right of recovery only for *damage* sustained by reason of violations of §§ 2, 3 (1) and 6(7) of the Interstate Commerce Act, 49 USCA §§ 2, 3(1), 6(7). But this single factor does not, as the Court repeatedly emphasizes, purge the trial of its errors or those which we compound of our own.[3] This is so because this case was submitted on a general verdict which left the precise basis for jury action as an "enigma wrapped in a mystery." Had the trial court, as we have many times suggested in these complex situations,[4] resorted to a general charge with special interrogatories under F.R. Civ.P. 49 (b), all of this would have been sufficiently exposed. Had that been done we could then have measured whether any assumed specific answer to the damage issue[5] or to the

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[3] For example, the Court, rejecting res judicata, in note 5 states:

"• • • The issues of causation and injury present in this case were not present in the I. C. C. proceedings. • • • The jury may have found that Southern violated the Act, but that the violations caused no injury to the defendants. There is no necessary inconsistency, therefore, between the jury's finding and the Commission's finding. • • •" 288 F. 2d 761-2.

Then, wiping out all theretofore stated, the Court disposes of the whole case on the damage issue. "Even assuming that the defendants violated the Act, the record supports the verdict on the basis that Shaw failed to prove any injury and that none of the plaintiffs successfully carried the burden of proving that the defendants' violations of the Act caused the plaintiffs' business losses." 288 F. 2d 776.

[4] Vickers v. Tumey, 5 Cir., 1961, 290 F. 2d 426, 432 n. 4, 435 n. 9; Travelers Ins. Co. v. Busy Electric Co., 5 Cir., 1961, ... F. 2d ... [No. 18778, July 17, 1961]; Warren Petroleum Co. v. Thomasson, 5 Cir., 1950, 268 F. 2d 5, 9 n. 3; Clegg v. Hardware Mutual Casualty Co., 5 Cir., 1959, 264 F. 2d 152.

[5] Since the Court finally falls back to this as the positive assurance of correctness of its decision of affirmance, I think it appro-

other two issues [855] was supportable in the evidence or erroneous in the instruction.

But as it was, the jury returned simply a general verdict for the Railroad. Whether it was on the basis of no damage, or on the basis of adequate rental, or diligent collection no one now or ever will know. But because it is all enveloped in this sometime desirable juridical fog, the rule of law is that, if an important jury charge turns out to have been erroneous (and properly excepted to), the whole verdict is infected and falls. The law, unable ever to solve the riddle in fact, has to assume that it was the erroneous charge which induced the verdict. Consequently, if the Court's charge erroneously submitted either one or both of the issues of (a) adequacy of the rental base or (b) diligence of collection of rent, the verdict may not stand notwithstanding the issue of damages.*

This brings me then briefly to some of the divergencies. In dealing with them I need not undertake to elucidate on which of the two answers is correct. Only one is right. Both may not possibly be the law simultaneously. And yet, so far, they are.

The rental basis was attacked as inadequate on several grounds, three of which were substantial: (1) it did not include depreciation, (2) it did not include substantial

priate to point out as a collateral recantation that this business of damages was handled in a strange way. By pretrial order the question of the *amount* of damages was expressly excluded from the trial. How careful, but conscientious counsel were to comply with this order and yet at the same time carry the burden of showing in a monetary way that, in the words of the judge's jury charge, "* * * at least some injury or damage resulted to each plaintiff as a result of a violation of the Act," 288 F. 2d 777, has never been made clear to me.

* Of course the matter would be different were the Court to determine as a matter of law that damages were not shown. We declined to do this and held it was for the jury. 288 F. 2d 770.

costs for specific items,[7] and (3), the use of 8% rather than 10% as the factor on the cost of improvements.

The Railroad contended that depreciation should not be included in the cost base because, under the "Round Robin Agreement," if and when it could legally be done, the Railroad and tenants were bound to carry out the initial agreement by which the tenants were to purchase the property. It is undisputed that the Railroad "* * * did not work depreciation into the rents * * * because the original agreement * * * was that the property * * * would be purchased at undepreciated cost, the rentals paid in the interim *not* to be credited to the purchase price." 288 F.2d 771. It is also undisputed that this item, in terms of money was of substantial significance either as a factor in determining the rate of return (8% or 10%) or as an item in the cost base to which either rate would be applied.

What did the Interstate Commerce Commission—the principal guardian of the public interest in effectuating the lofty aims of the Transportation Act of 1940, 49 USCA § 1 et seq., do with this contention of the Railroad? This was flatly rejected by the Commission. And this was expressly affirmed by the 3-Judge Court. After conceding a certain logical plausibility to the argument were the landlord one other than a common carrier leasing a "freight producing facility," the Court condemned it outright:

> "However, such a rental formula would be the equivalent of an agreement by the railroad to postpone part of the rent to a future date resulting in an unlawful loan or extension of credit similar to the

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[7] These aggregated, on plaintiff's contentions, over $952,000. The items were tabulated in note 9 of the Court's opinion, 288 F. 2d 765. The three items of Grading Tracks and Interest Cost total over $800,000.

The 3-Judge Court dealt with this at 186 F. Supp. 36, and notes 4 and 5.

extension of credit on delayed rent collections, condemned by the Commission. * * * [citing cases]." 186 F. Supp. 38.

The 3-Judge Court then proceeded to point out that the so-called repurchase agreement—asserted as an excuse for exclusion of a depreciation factor—required the tenants "* * * to purchase only under the financing plan whereby Southern's property and credit are substituted for that of the tenants to obtain the purchase funds:" 186 F. Supp. 38. The Court continued: "This financing plan, with its otherwise unsecured second mortgage, and its first mortgage which is fortified by the additional security of Southern's full guarantee of the obligations of Terminal Corporation and the separate obligations of each tenant, is merely a more complex form of credit extension such as those condemned in Vandalia R. Co., supra; Hocking Valley R. Co., supra; and Propriety of Operating Practices—New York Warehousing, supra * * *." 186 F. Supp. 38.

In short, the ICC and the 3-Judge Court held categorically that notwithstanding the potential purchase of the properties by the tenants at an undepreciated figure at an uncertain time in the future, depreciation had to be taken into account because, even on that assumption, it was an unlawful extension of the Railroad's credit for that period of time.

And what did we do to that standard? By affirming the trial judge's charge that the jury need not consider depreciation if it found that Southern and the tenants intended at all times to revert to the original purchase-sales plan, this Court rejected outright the standard of conduct exacted by the ICC. What the Court described as the "plaintiff's theory"[8] was actually a paraphrase of the words

[8] This Court's opinion states:

"The plaintiff's theory is that the charge was erroneous, even if eventually the property would be purchased at the

of the 3 Judge Court quoted above. In rejecting the plaintiff's theory, we rejected the legal standard adopted by the Commission and affirmed by the 3-Judge Court.

As to this contention of the plaintiffs and the flat holding of the ICC and the 3-Judge Court, we merely acknowledged that the "argument carries a little aroma of plausibility." We then rejected it out of hand since it would "* * * allow Southern to recover the depreciation twice, once in the sale and a second time by including the element of depreciation in computing the cost-base for rentals." 288 F. 2d 772.

The same thing happened as to the exclusion of specific substantial items in the cost base. See note 7, supra. The ICC and the 3-Judge Court held that some of these identical items had not been included adequately in the cost base.[9] The 3-Judge Court made it very plain:

> "The cost base employed by Southern did not include all of the costs of construction. * * * The Commission found that land under spur tracks and in areas where its utilization is otherwise essential to the occupancy of the tenants was wrongfully excluded from the cost base. It likewise found that substantial costs for grading, construction of spur tracks, and promotion and engineering expenses were improperly excluded. Southern used 8 percent as the rental factor on construction costs rather than the 10 percent factor under the prevailing market rental practice." 186 F. Supp. 36.

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undepreciated cost, because the rent would result in the indirect loan, without interest, of the depreciation—until the sale occurred. As a result, they argue, the carrier unlawfully furnished working capital to the tenants." 288 F. 2d 772.

[9] The intrinsic merits of each item has been carefully considered by the ICC. See notes 4 and 5, 186 F. Supp. 36 which indicate some of the items on which the ICC agreed with the Railroad.

The 3-Judge Court then characterized this matter in terms which epitomized a century's history: These "* * * railroad rental practices condemned by the Commission are not novel. They are but variations of practices which have been uniformly condemned by the Commission and the courts * * *." 186 F. Supp. 36. It was in such sweeping words that the 3-Judge Court affirmed the ICC order which ordered the Railroad to "cease and desist * * * and thereafter [857] * * * abstain from the unlawful rental practices * * *"[10] and required the Railroad to file record proof of its compliance.

Bearing in mind that there was but one terminal facility constructed and these items of disputed cost were identical in both proceedings, what rule of law did this Court lay down? Whereas the ICC held that the leases could no longer subsist and that the Railroad would have to take affirmative action to terminate them, we held that it was for the jury to say whether the leases were or were not valid because these items were or were not properly included in the cost base. The strong public policy effectuated by the ICC order was left to the jury of untrained persons to determine both fact and the relative importance of legal factors. We said in the broadest terms:

> "In final analysis the propriety of Southern's including these items in fixing rentals and the weight to be attached to any one or more of these items were questions for the jury." 288 F. 2d 773.

Moreover, as to both of the elements of (a) depreciation and (b) exclusion of specific items, there was a further decisive divergence. It assumes central importance since, as to both, this Court left it to the jury to make the determination. The standard of measuring adequacy of the rent was succinctly declared by us:

[10] See note 1, 186 F. Supp. 32.

> "We consider that fair rental value, that is, 'fair market rent', rather than a compensatory return is the proper standard, at least in this type of action, because the suit rests on a claim for damages caused by destructive competition." 288 F. 2d 772.

By rejecting the requirement that the rental produce a "compensatory return," we then held that considering general real estate conditions in Birmingham "the jury could have concluded that the plaintiffs failed to show that it was economically feasible for Southern * * * to obtain tenants willing to pay rent that would yield ten per cent on warehouse buildings * * *." 288 F. 2d 772.

Contrast this with the standard set by the ICC and declared by the 3-Judge Court in these emphatic terms:

> "Emerging from these cases is the clear rule that rents railroads charge for facilities leased for the purpose of attracting freight must be no less than the prevailing market rents in the area,[11] and no less than compensatory, including the normal return on capital employed in like enterprises, whichever is higher. A carrier is prohibited from engaging in such noncarrier business on a more favorable basis than other business because it can offset any losses against carrier revenues. It cannot operate noncarrier business as a means of securing freight business free of the Commerce Act's required standards for carrier conduct." 186 F. Supp. 37.

Where we had held that the "jury could have concluded * * *" that it was not "economically feasible" for the Railroad to obtain tenants on a rental that would produce a fair return on actual costs, 288 F. 2d 772, the 3-Judge

[11] We had earlier quoted so much of Judge LYNNE'S opinion down to this point. 288 F. 2d 770. The effect was to put altogether the comparative standard of prevailing market rents versus compensatory return, whichever was higher.

Court applied strong words in expressly rejecting the Railroad's contention that the rental should take into account "the depressive effect on Birmingham market rents of the construction of their food terminal facilities." 186 F. Supp. 38.[12] [858]

The divergence is even more graphic as to the element of failure to collect rents.

The tenants were the same in both proceedings. The rent due and payable was identical. The rent paid and unpaid was the same. The principal offender was Thomas N. Nelson & Company. It was over $135,000 in arrears. All tenants were in arrears an aggregate of $335,000. 186 F. Supp. 35; 288 F. 2d 774-75.

The ICC held that this constituted unlawful discrimination and ordered that the Railroad cease and desist. This part of the order was not even attacked in the 3 Judge Court proceeding.[13]

But again, as we had done with these other critical legal standards promulgated by the ICC and affirmed by the 3 Judge Court and as to every related fact finding made by the Commission, we left this to the jury as well:

> "We cannot say, as a matter of law, that the failure to collect rentals was so lacking in diligence that it constituted a violation of the Act. The trial judge properly submitted the question to the jury. Sufficient evidence supports the jury's verdict." 288 F. 2d 775.

My position as to all of this is simple: the law may not say to a railroad that this lease is unlawful and must be

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[12] The Court stated: "* * * we are of the opinion that under the teaching of Baltimore & Ohio R. Co., a railroad cannot justify discharging of lower rents because of the depressive effect upon existing market rentals of its action in constructing facilities rented at a substantially lower rental." 186 F. Supp. [illegible]

[13] See note 2, 186 F. Supp. 33.

discontinued, and at the same time say to the railroad that as to the very same lease, calling for payment of the very same rentals, relating to the very same tenants, a jury may nonetheless determine it to be legal.

This transcends this Court's euphemism of "paradoxical results."[14] It disregards altogether the right to recover damages as a sanction in the effectuation of an important congressional policy forbidding any and all kinds and types of discriminatory practices. Such a result frustrates the effectual enforcement of that policy. It leaves the body charged with the responsibility of a continuing policing of that grand scheme with the power merely to make pious but academic declarations. True, a cease and desist order could be entered but as these two proceedings demonstrate, that is thought to be a matter of little importance to the railroad. By practices condemned outright by the ICC and which it may no longer carry on, it has built a terminal which unlawfully favors the tenants. The deed is done. By this Court's action it is not only permitted to litigate (as it properly should be entitled to) the question of whether such violations cause damage to competitors. It is permitted once again to litigate the underlying question whether those practices were unlawful.

This result would be avoided had the trial court and this Court paid proper heed to the doctrine of primary jurisdiction. *United States v. Western P. R. Co.*, 1956, 352 U.S. 59, 77 S.Ct. 161, 1 L.Ed. 2d 126; *Southwestern Sugar and Molasses Co. v. River Terminals Corp.*, 1959, 360 U.S. 411, 79 S.Ct. 1210, 3 L.Ed. 2d 1334, 1959 AMC 1631; *Far East Conference v. United States*, 1952, 342 U.S. 570, 574-5, 72 S.Ct. 492, 96 L.Ed. 576; *Federal Maritime Board v. Isbrandtsen Co.*, 1958, 356 U.S. 481, 498, 78 S.Ct. 851, 2 L.Ed. 2d 926.

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[14] See note 5, 288 F. 2d 764

The nature of the doctrine of primary jurisdiction is discussed at length in the *Western Pacific* case, supra. It, says the Court, "like the rule requiring exhaustion of administrative remedies, is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties." 352 U.S. 59, 63. In contrast to "exhaustion" of remedies which merely is a precedence in point of time, primary jurisdiction "on the other hand, applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the [859] judicial process is suspended pending referral of such issues to the administrative body for its views." 352 U.S. 59 at 64. Of the two factors bearing upon its application, the one which has been "particularly stressed" more recently is "the expert and specialized knowledge of the agencies involved. * * *" 352 U.S. 59, 64. Desirable uniformity and expertness as two factors "are part of the same principle, 'now firmly established, that [1] in cases raising issues of fact not within the conventional experience of judges or [2] cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over. This is so even though the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined * * *." 352 U.S. 59, 64.

Its true nature is demonstrated by the fact that the "doctrine of primary jurisdiction thus does 'more than prescribe the mere procedural timetable of the lawsuit.'" 352 U.S. 59, 65. Thus the fortuitous fact that the jury trial was had prior to the time the 3-Judge Court enforced the [C] order, or the appeal in our Court was argued prior

to the submission of the 3-Judge case but finally determined by the opinion of March 3, 1961 (288 F. 2d 759) after the decision of the 3-Judge Court on July 18, 1960 (186 F. Supp. 29), are all factors of no decisive significance. The basic validity of this whole terminal project was before the Interstate Commerce Commission pursuant to the obligations imposed on it. It was required to and did determine that this project constituted unlawful rebates and favoritism. Once it made this determination concerning this single entire project, it became a binding declaration[15] since primary jurisdiction "is a doctrine allocating the law-making powers over certain aspects of commercial relations." 352 U.S. 59, 65.

The operation of that doctrine here required that the District Court and this Court accept the expert judgment of the Commission concerning the basic legality or illegality of the project.[16] For the operation of the doctrine is that it " 'tranfers from court to agency the power to determine' some of the incidents of such relations." 352 U.S. 59, 65.

I therefore respectfully Dissent.

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[15] This does not mean, of course, that the decision of the administrative agency is not subject to judicial review. On the contrary, the 3-Judge proceeding is the precise means established by Congress to determine whether agency action is acceptable as a matter of law. The consequence of our decision is to set up two reviewing tribunals.

[16] This would, to be sure, leave the question of causation and damages for the court proceeding.

APPENDIX D.

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION.

SOUTHERN RAILWAY COMPANY, et al.,
Plaintiffs,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, et al.,
Defendants.

C. A. 9586

United States District Court,
N. D. Alabama, S. D.
186 F.Supp. 29.

[32] Before Richard T. Rives and Elbert P. Tuttle, Circuit Judges, and Seybourn H. Lynne, District Judge.

Lynne, District Judge. Proceeding under the provisions of 28 U.S.C.A., Sections 1336, 1398, 2284, 2321-2325, 5 U.S.C.A., Section 1009, and 49 U.S.C.A., Section 17(1), plaintiffs Southern Railway Company (Southern), Georgia Industrial Realty Company (Realty Company), a wholly owned subsidiary of Southern, and Birmingham Food Terminal Corporation (Terminal Corporation) brought this action to enjoin or set aside the report and order of the Interstate Commerce Commission, dated October 6, 1959, in the Commission's Docket No. 32241, Shaw Warehouse Company vs. Southern Railway Company et al. The report of the Commission is officially reported at 308 I.C.C. 609.[1]

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[1] The Commission's order, not officially reported, is quoted herewith:

"This proceeding being at issue upon complaint and answers on file, and having been duly heard and submitted by the par-

The order complained of was entered in a proceeding commenced by the filing of the July 25, 1957, complaint of Shaw Warehouse Company (Shaw Company), in which proceeding the Bureau of Inquiry and Compliance of the Commission (Bureau of Inquiry), Birmingham Ice and Cold Storage Company (Birmingham Ice), Harris Transfer Company (Harris Transfer) and Harris Warehouse Company (Harris Warehouse), and the Louisville and Nashville Railroad Company intervened. Shaw Company, Birmingham Ice, Harris Transfer and Harris Warehouse also intervened as defendants herein pursuant to the provisions of 28 U.S.C.A., Section 2323.

In the report and order here under attack, the Commission found that, in their leasing of the facilities known as the Birmingham Food Terminal (Terminal Facilities), Southern and its real estate development subsidiary, Realty Company, have violated the anti-concession prohibition against undue and unreasonable discriminations, prejudices and advantages and against departures from, and the extension of privileges and facilities other than those specified in, the railroads' published tariffs [49 U.S.C.A., § 2, § 3(1), § 3(2) and § 6(7)].

ties, oral argument having been had, and full investigation of the matters and things involved having been made, and the Commission having, of the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof;

"It is ordered, That the defendants named in the complaint, according as they participate, be, and they are hereby, notified and required to cease and desist, on or before December 21, 1959, and thereafter to abstain from the unlawful rental practices, described in the report made a part hereof, in connection with the operation of the Birmingham Food Terminal at Birmingham, Alabama.

"It is further ordered, That said defendants, according as they participate, be, and they are hereby, notified and required to file with this Commission, in affidavit form, a statement of action taken to correct these practices on or before December 21, 1959.

"And it is further ordered, That this order shall continue in force until the further order of the Commission."

Before both Commission and Court plaintiffs have consistently maintained that the Commission had no power to grant the relief requested by Shaw or any of the warehouse intervenors under the foregoing sections of the Interstate Commerce Act. They insist that this is for the reasons that none of the warehouse intervenors is a shipper or [33] receiver of freight; that the railroad does not provide "a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions" for the warehouse intervenors and the tenants of Terminal Corporation so as to give rise to a prohibited discrimination under 49 U.S.C.A., Section 2; that without such discrimination there can be no unlawful "preference" prohibited by 49 U.S.C.A., Section 3(1), and that there can be no prohibited rebate within the meaning of 49 U.S.C.A., Section 6(7) without a showing that facilities are provided a shipper on a non-compensatory basis.

Having performed its duty to canvass the whole record of the proceeding before the Commission in obedience to the command of the Administrative Procedure Act (5 U.S.C.A., § 1009), instructed by the teaching of Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474, 715, the Court, in a desire to compress its discussion of a voluminous and complex record within reasonable limits, will respond to plaintiffs' threshold contentions in the body of this opinion.

On the basis of specific findings that the rentals charged for the use of the railroad's facilities were substantially below those prevailing under established market practices, and that the railroad had followed a practice and pattern of delayed collection thereof, and of extending credit on freight bills beyond the 96 hours allowed by the regulations of the Commission, it issued an order requiring plaintiffs to cease and desist from unlawful rental practices and

to file with the Commission, in affidavit form, a statement of action which they have taken to correct such practices.[2]

The terminal facilities with which we are concerned came into existence as a result of a program initiated by Southern in 1954, designed to promote a produce terminal facility, shortly thereafter expanded into promotion of a fully integrated food wholesale, processing, and warehousing facility. Southern's study of the produce aspects of the project alone showed that if such facilities could be constructed at a location on the lines of Southern outside the reciprocal switching district of Birmingham, so as to assure exclusive rail service by Southern, it could expect to attract new freight revenues from its competitors, ranging up to five hundred thousand dollars per year.

Early in the promotion, Southern's vice president, F. H. Brown, instructed Joseph DeOreo,[3] a professional promoter who had come to Birmingham at Southern's request and who had become affiliated with a local farmers' cooperative, Jefferson County Truck Growers' Association (Truck Growers), to concentrate his efforts on the six largest produce receivers in the area. Brown took the position that if a substantial number of these could be obtained, circumstances and trade influences would force the others to come into the terminal that Southern proposed to build. He stated that holdouts would "have to follow suit or wither on the vine . . . they would have to join the parade or perish."

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[2] The original effective date of the order was December 21, 1959. This was later extended to March 8, 1960, to permit consideration of a motion for reconsideration, and, upon the filing of this action was further extended pending further order of the Commission. Only the findings with respect to rentals are attacked herein; no complaint is made of the Commission's findings with respect to extension of credit, on rents and freight bills.

[3] That DeOreo was no stranger to similar promotion efforts, see Union Pacific R. Co. v. United States, 1941, 313 U. S. 450, 61 S. Ct. 1064, 85 L. Ed. 1453.

The development was facilitated by the incorporation of Terminal Corporation on February 10, 1955, as a non-profit corporation with paid-in capital of only two thousand dollars. This company has occupied no office space or other premises, and has had no employees or paid officials. It was designed as a conduit through which business between **[34]** Southern and occupants of the terminal could be channeled.

As originally conceived the promotion plan contemplated that the necessary land would be conveyed by Realty Company to Terminal Corporation under a 4 percent second mortgage on which interest would be payable annually, but no principal payments would be due during the twenty-five-year life of the mortgage. A construction loan would be obtained in the name of Terminal Corporation, which loan would be secured by a first mortgage on the same land and the facilities to be constructed thereon. The land and improvements, subject to these first and second mortgages, would be leased to Realty Company for twenty-five years at a rental equivalent to the principal and interest payments required under the first mortgage. This lease would then be assigned to the first mortgagor as collateral security. Thereafter, Realty Company would lease the same property back to Terminal Corporation for the same rental period and for substantially the same rent. Facilities constructed on portions of the property for the individual tenant-purchasers would then be sold to such tenant-purchasers, subject to the mortgages and leases described. As a condition of securing the first mortgage loan, an agreement would be executed between Southern and the first mortgagee guaranteeing the performance of all of the obligations assumed by Realty Company under its lease of the property from Terminal Corporation. This guarantee by Southern was designed and intended to permit the tenant-purchasers to purchase their individual

facilities, each independent of the other, without being required to make any down payment on the purchase price and to secure for them the lowest possible interest rate by extending to them the use of Southern's credit with the lending agency. The purchase price itself was to be substantially reduced by reason of the fact that Southern, for itself, was to pay a substantial portion of the costs, and was to retain title to certain portions of the land devoted to the use of the terminal participants. For example, the purchase price would not include any of the substantial costs of grading the property, or any of the value of land devoted to service tracks or a large portion of the land devoted to driveway areas serving the terminal. Nor would it include any of the costs of paving such driveway areas or those portions of driveway areas which crossed service track areas retained by Southern. The purchase price, however, was to include the interest costs of interim financing required during the period of actual construction.

On September 26, 1955, Atlantic Coastline and several other railroads filed a petition with the Interstate Commerce Commission seeking an investigation into the legality of such proposed sales plan. Southern thereupon modified its terminal plan on October 18, 1955, agreeing, through Realty Company, to undertake the construction of the facilities and to lease them to the proposed tenant-purchasers, under separate leases for each, for a period of five years with option in the tenants to renew for an additional five-year period. The separate leases were to be assigned to Realty Company. The lease agreement provided that if the original plan was determined by proper authorities, to the satisfaction of Southern, to be legally sound, both tenants and railroad would be obligated to carry out the sales agreement. In any event, the tenants were given an option to purchase the property at the cost

price provided for in the original plan at any time during the potential ten-year term of the lease. The rental under this lease plan was set at 6 percent per year of the cost base represented by the sales price under the original plan, from which base Southern had agreed to exclude substantial costs. It was agreed that the total rental would be distributed among the tenants on the basis of the square feet occupied by their facilities and by the expansion areas adjacent thereto which most tenants had reserved.

[35] Beginning in June, 1955, prior to the completion of the entire terminal facility, certain of the individual buildings were completed. Some of these were occupied, wholly or partially, as they became available. The earliest of such occupancies was that of a public cold and dry storage warehouse company, Thomas N. Nelson & Company (Nelson Company) on May 15, 1956. Until the entire terminal was declared officially completed on July 31, 1957, monthly rents were negotiated with individual tenants roughly on the basis of the costs expended and included in the rent base under the October, 1955, agreement, and of the portion of the property available for use by the tenants. In virtually all instances there were lags of several months in the billing and collection of these rentals. At the time of the hearing before the Commission on January 21, 1958, Nelson Company had paid rent for a period of only two months of its entire occupancy, and was over $135,000 in arrears. It was charged no rent at all for the period May 15, through July 31, 1956. During the hearing before the Commission on February 27, 1958, Southern instituted an action against Nelson Company and Terminal Corporation for rent in the amount of $135,000 owed by Nelson Company. As of that date, all of the tenants of the Food Terminal were in arrears on their rent since September, 1957, in amounts aggregating, under the rail

road's method of computing rents, over $335,000. The action against Terminal Corporation, however, included no effort to collect this rent and, although the president of Nelson Company had previously testified in the hearing that his company could not pay the rent due, and that during its entire period of occupancy it had never been in a position to pay the rents owed by it at any time, no effort was made by the railroad to evict the tenant.

The discontinuance of payment of rent by other tenants was said to stem from their unwillingness to pay rent in the amounts required under their October, 1955, lease agreement. By withholding rental payments, it appears that in January, 1958, they secured an agreement from the railroad to reduce the rents due under their leases by an aggregate amount of approximately $32,000 annually. This was accomplished through the agreement of Southern to remove from the cost-rental base the sum of $392,816.06 which was required to be allocated under the October agreement to areas set aside for various tenants for future expansion. These costs were reallocated by Southern to these expansion areas and to building areas otherwise set aside for future tenants.

During the hearing before the Commission, several of the tenants testified, however, that they would pay the rents owing if the railroad would only send them a bill. One tenant testified that he had received from the railroad no demand for his rent and that he had stopped payment because he "could not see any point in us paying rent when other people were not paying rent." Several other witnesses testified that there had been no demand for payment but that they were willing to pay rent only if Southern would reduce the cost basis of their rent to a point satisfactory to them. Others testified that they would pay rent only if their right to purchase their building was clarified.

The evidence showed that the prevailing market practice in the Birmingham area for newly constructed commercial facilities, such as those in Southern's terminal, was to require a rental based on 8 percent of the value of land and 10 percent of all construction costs and all other expenses including incidentals, such as architects' fees. However, such rental terms represented a maximum for national concerns with substantial financial standing, with ten to fifteen year term leases, where the buildings were of multi-purpose construction which would enable them easily and readily to be relet in the event of a lease cancellation or financial failure of the tenant. Where the lease is shorter, the financial standing questionable, where significant amounts of special equipment are included in the buildings, such as the refrigerated [36] storage space or smokehouses built into various of Southern's facilities, higher rents or longer term leases generally would be required.

Clearly, there is substantial evidence in the record showing that Southern's rental program, even if enforced to the letter of the October, 1955, agreement, did not measure up to prevailing market rental practices. The cost base employed by Southern did not include all of the costs of construction or all of the value of land.[4] The Commission found that land under spur tracks and in areas where its utilization is otherwise essential to the occupancy of the tenants was wrongfully excluded from the cost base. It likewise found that substantial costs for grading, construction of spur tracks, and promotion and engineering expenses were improperly excluded.[5] Southern

[4] There was considerable evidence opposing the twenty-five hundred dollar per acre valuation of land employed by Southern, but the Commission held that it could not say that such valuation was inadequate. 308 I.C.C. at 620.

[5] The Commission held that Southern should not be required to include the costs of the lead track, certain spur tracks serving the

used 8 percent as the rental factor on construction costs rather than the 10 percent factor under the prevailing market rental practice.

It should be emphasized that this court is not essaying the impermissible role of fact finder. However, in the discharge of its duty to canvass the whole record in arriving at a determination as to whether there is a rational basis for the ultimate conclusions of the Commission, we have deemed it appropriate to discuss facts which are supported by substantial evidence in the record. While the body of evidence opposed to the Commission's findings has been considered, to discuss it would be to prolong this opinion unduly.

The railroad rental practices condemned by the Commission are not novel. They are but variations of practices which have been uniformly condemned by the Commission and the courts under both the Interstate Commerce Act and its cognate statute, the Elkins Act, which, for such purposes have been considered to be in *pari materia*. These statutes, remedial in nature, "are applicable to every method of dealing by a carrier by which the forbidden result could be brought about." New York, N.H. & H.R.Co. vs. Interstate Commerce Commission, 1906, 200 U.S. 361, 26 S.Ct. 272, 277, 50 L.Ed. 515. Because of the indirect forbidden concessions which necessarily result from inadequate rentals for freight-producing facilities, railroads have in the past successfully invalidated their own lease agreements because of such rental arrangements. Cleveland C.C. & S.L.R.Co. vs. Hirsch, 6 Cir. 1913, 204 Fed. 849; Central of Georgia R.Co. vs. Blount, 5 Cir. 1917, 238 Fed. 292. In Leases and Grants by Carriers to Shippers, 73 I.C.C. 671, 683 (1922), the Commission announced

nonshipping truck growers, tracks, which it found conducive to use as team tracks, and the costs of demolishing old buildings and removing old tracks. 308 I.C.C. at 630. These findings were not challenged in this proceeding.

as a general policy to be followed by all railroads that railroad-owned warehouses should not be leased on terms "less favorable than would be obtained under similar conditions and restrictions of use, were the land owned independently of the railroads." And, in Propriety of Operating Practices—Packing Sheds, 246 I.C.C. 273, 280 (1941), the Commission specified that the commerce laws required that "where new facilities are built, 'the total rental should be not less than enough fully to cover a fair return on value plus taxes, insurance, depreciation and maintenance, and no such new construction should be undertaken unless there is assurance, with all reasonable certainty, that such rental can and will be collected.'"

Such railroad rental programs have been considered on two occasions by the Supreme Court. In Baltimore and Ohio R.Co. vs. United States, 1939, 305 U.S. 507, 59 S.Ct. 284, 83 L.Ed. 318, the **[37]** Court sustained an order of the Commission requiring various railroads operating and leasing warehouses in the New York City area to charge no less than fully compensatory rents. Such rents were ordered even though it appeared that rents thus required would be higher than prevailing market rents because the railroads had constructed so much more dry and cold storage warehouse space than was needed in the area that they had depressed the normal rates and rentals. The District Court had observed (20 F.Supp. 273, 278). "It is no answer to the violations of the statute to say that as the railroad has a losing piece of property on its hands which it acquired in good faith it should be permitted to rent it for its fair rental value. That is true only provided so doing does not violate the law. While it may lawfully minimize its losses from bad investments, it may not give concessions to a favored shipper." While the Supreme Court noted that where freight is not an object, and competitive practices are absent, reasonable

or market value might be the proper test of such rents, it was clear in its conclusion that rents should not be less than compensatory where facilities were furnished for the purpose of securing freight. The Court observed:

> ". . . It is immaterial that the shipper pays fair value or the market price for the extra privilege he enjoys. Section 6(7) of the Act forbids the carrier to receive less than the published rates for transportation or to remit 'by any device any portion of the rates'. When services, not necessary for transportation, are furnished below cost in an effort to acquire rail transportation, as was done here, this provision is violated. Since the carrier warehouse rates, as found by the Court and Commission, are not open to all shippers alike there is a violation of §§ 2 and 3 (1) prohibiting discrimination and unreasonable prejudice. The rail transportation rates have charged against them the loss occasioned by warehousing practices designed to attract a volume of rail business" (305 U.S. at pages 523-524, 59 S.Ct. at page 290).

Emerging from these cases is the clear rule that rents railroads charge for facilities leased for the purpose of attracting freight must be no less than the prevailing market rents in the area, and no less than compensatory, including the normal return on capital employed in like enterprises, whichever is higher. A carrier is prohibited from engaging in such noncarrier business on a more favorable basis than other business because it can offset any losses against carrier revenues. It cannot operate noncarrier business as a means of securing freight business free of the Commerce Act's required standards for carrier conduct.

The language in the Supreme Court opinion in Union Pacific R.Co. vs. United States, 1941, 313 U.S. 450, at page

464, 61 S.Ct. 1064, 1076, 85 L.Ed. 1453, that rents there need not be compensatory is not inconsistent with this rule. There the railroad and the city of Kansas City, Kansas, jointly promoted a food terminal. The city provided the land and the Public Works Administration, a federal agency, furnished about 45 percent of the construction funds. Except for the participation of the railroad there would have been no commerce law restrictions on rental levels. But because of the railroad's participation it was held that rents must be no less than "fair rental value", even though such rent might not be compensatory on the investment of all of the joint participants in the financing. The Court prescribed a series of tests to be applied in determining the rents to be charged by the city under these circumstances. These were: (1) going rates for similar facilities in the community; (2) rents prospective tenants are willing to pay; (3) over-all cost and over-all value of the properties; (4) cost of furnishing the facilities, including the normal return on capital employed in like enterprises, and (5) **[38]** other pertinent factors which might emerge. Under Baltimore & Ohio, it was recognized that the Commission had the power "whenever it is of the opinion that any practice is unjust, unreasonable, preferential or otherwise violative of the Act, to prescribe what practice will be just, fair and reasonable." In this case the Commission found that the Union Pacific standards "may well be applied in this proceeding." In doing so, it found that "the basis upon which the assailed rents were constructed was and is unduly low by comparative standards, as is also the defendant carrier's return on its investment." It justifiably concluded that "little value can here be attached to the factor of the rentals that the tenants are willing to pay, for as shown, some of the tenants appear dissatisfied in varying degrees with the low rentals they are now paying." It found that the rents did not reflect over-all costs

and over-all value and were substantially below the prevailing practice which, after considering costs of furnishing the facilities, must provide the normal return on capital employed in like enterprises. Thus, the Commission logically concluded that even the special tests of Union Pacific were not met by Southern's practices.

Plaintiffs suggest that the Commission did not, as it should have, consider as "other pertinent factors" under Union Pacific tests: (1) the provision for purchase under the October, 1955, lease agreement; (2) alleged informal approval by the Commission of its 8 percent rent formula, and (3) the depressive effect on Birmingham market rents of the construction of their food-terminal facilities. The record demonstrates that all of these factors were considered and rejected by the Commission.

As to the first of these proposed factors, Southern insists that in fixing its rental charges it was not required to take into account depreciation costs because, it contends, the tenants are obligated by the October, 1955, lease agreement to purchase the facilities at undepreciated cost. If this were true, and if the landlord was not a railroad leasing freight producing facility, there would be some logic in this position since its 8 percent rent would treat all of the costs as being subject to depreciation in the same manner as the prevailing market rental practice treats land. However, such a rental formula would be the equivalent of an agreement by the railroad to postpone part of the rent to a future date, resulting in an unlawful loan or extension of credit similar to the extension of credit on delayed rent collections condemned by the Commission. See Vandalia R. Co. v. United States, 7 Cir. 1915, 226 Fed. 713; United States v. Hocking Valley R. Co. D.C.N.D. Ohio, 1911, 194 Fed. 234, affirmed 6 Cir., 1914, 210 Fed. 735, certiorari denied 1914, 234 U.S. 757, 34 S.Ct. 675, 58 L.Ed. 1579; Propriety of Operating Practices

—New York Warehousing, 216 I.C.C. 291 (1936), affirmed 220 I.C.C. 102 (1937) sustained; Baltimore & Ohio R. Co. v. United States, D.C.D.Md., 1938, 20 F.Supp. 273, affirmed 1939, 305 U.S. 507, 59 S.Ct. 284, 83 L.Ed. 318.

Assuming, *arguendo*, that such agreement is enforceable as a matter of law, practical obstacles such as the low capitalization of Terminal Corporation and the insolvency of Nelson Company abound in the record. Moreover, the tenants can be required to purchase only under the financing plan whereby Southern's property and credit are substituted for that of the tenants to obtain the purchase funds. This financing plan, with its otherwise unsecured second mortgage, and its first mortgage which is fortified by the additional security of Southern's full guarantee of the obligations of Terminal Corporation and the separate obligations of each tenant, is merely a more complex form of credit extension such as those condemned in Vandalia R. Co., *supra*; Hocking Valley R. Co., *supra*; and, Propriety of Operating Practices—New York Warehousing, *supra*. Cf. Section 20(a) of the Interstate Commerce Act [49 U.S.C.A., 20(a)]; Texas and R.R.Co.—Assumption of Obligation, 271 I.C.C. 230 (1948); Lehigh [39] Valley R.R.Co.—Conditional Sales Contract, 223 I.C.C. 329 (1939). The Commission did not pass upon the validity of the sale plan; consequently, it is not before this court on review. However, in view of the fact that the cost-price under the sales plan excludes the very cost which the Commission held could not be lawfully excluded from the rent base, we fail to see how Southern can here complain of the action of the Commission in adopting a rental plan which requires the application of a higher rental factor to depreciable items of cost.

Southern further contends that the Commission should have sustained its 8 percent rent formula because of certain informal communications with Commission personnel.

Following the filing of the Atlantic Coastline R.Company petition for investigation in September, 1955, the Commission ordered the Bureau of Inquiry to investigate Southern's proposed food terminals at Birmingham and other cities along its lines to determine whether criminal prosecutions under the Elkins Act in one or more cities were indicated. In November, 1955, Southern wrote a letter to the Commission's chief examiner stating that until its sale plan was determined to be legal, it had adopted a rental plan in Birmingham. Under such plan Southern represented that the rents would be based on 8 percent of *full costs*. In May, 1956, the attorney for Terminal Corporation had an *ex parte* conference with a member of the Commission wherein the attorney states, in affidavits attached to the petition for reconsideration filed with the Commission, that he was given oral assurances that Southern's 8 percent rental program had the Commission's approval. On May 3, 1956, the Director of the Bureau wrote a letter to a member of the Congress stating that the Bureau's Birmingham investigation had been completed and on the basis of its report the Commission had decided not to recommend prosecution. Such letter stated, "The Bureau's investigation disclosed that under its present plan, the Southern Railway is constructing the terminal at its own expense, retaining ownership thereof, and will lease at an annual rental equivalent to 8 percent of the value of the land and the cost of construction of the buildings and all expenditures in connection therewith. Upon the facts disclosed, the Commission did not find that the rental would be inadequate."

Complaining that the Commission erred in refusing to admit evidence of these informal advices, Southern is here insisting that they constituted at least some evidence of proper rents in Birmingham. We do not agree. The Commission did consider the letter of May 3, 1956. It found, "this was an informal opinion of the indicated

official based on an informal investigation made prior to the construction of the terminal and hence without the benefit of the actual costs later incurred thereon. Thus it clearly had no evidentiary value and was properly rejected." Such letter indicated no more than an opinion that there would be no criminal prosecution. It did not represent or purport to constitute an approval by the Commission. It was neither the equivalent of a declaratory order issued by the Commission after public hearings under Section 5 (d), The Administrative Procedure Act [5 U.S.C.A., § 1004(d)], nor an order of the Commission under Section 20(a) of the Interstate Commerce Act upon an application for Commission approval of financing arrangements.

A fortiori, the Commission properly disregarded evidence of informal oral advice given to the attorney for Terminal Corporation. The rights of parties, including intervenors, to the proceeding then pending before the Commission involving the legality of the rental arrangements would have been unduly prejudiced in their claims to the protection of the Commerce Act by the reception of evidence pertaining to oral *ex parte* assurances.

With respect to the contention that the Commission did not consider the possibility of a depressive effect on Birmingham market rents of Southern's [40] construction of the warehouse facilities involved herein, it is apparent that the Commission did consider this argument. Commissioner Webb based his dissent upon it. (308 I.C.C. 640.) But we are of the opinion that under the teaching of Baltimore & Ohio R. Co., a railroad cannot justify its charging of lower rents because of the depressive effect upon pre-existing market rentals of its action in constructing facilities to be rented at a substantially lower rental.

Upon our review of the record in this case, we find that the Commission's conclusions and findings are supported

by substantial evidence. On the issues raised, even if we disagreed with the Commission, we would not be free to overturn its decision. Where an order of the Interstate Commerce Commission is attacked as being contrary to the evidence, the judicial function in this respect is exhausted when there is found to be a rational basis for the conclusions of the Commission. Mississippi Valley Barge Line Co. v. United States, 1934, 292 U.S. 282, 287, 54 S.Ct. 692, 78 L.Ed. 1260. The complaint admits that there was testimony to support the Commission's findings with respect to Birmingham rental practices although plaintiffs attack the credibility of such testimony. But it is the task of the Commission and not of the courts to pass upon the weight and credibility of the evidence. Moreover, there is a presumption that the Commission has properly performed its official duties and this presumption supports its acts in absence of clear evidence to the contrary. See, American Trucking Association v. United States, D.C.N.D. Ala., 1951, 101 F.Supp. 710, affirmed, 1953, 344 U.S. 298, 73 S.Ct. 307, 97 L.Ed. 337.

Plaintiffs insist that the Commission's requirement that the railroad include in the rental base the cost of spur tracks designed to service the individual facilities of the terminal is a taking of its property without due process of law. The record supports no such conclusion. Southern is not required to surrender the normal and usual control over such tracks; it is merely required to include their cost in the costs upon which rentals are based just as any other landlord would do if it provided such facilities.

Plaintiffs further contend that they were prejudiced by the participation of the Commission's Bureau of Inquiry and Compliance in the proceeding. The record discloses that the Bureau intervened pursuant to open petition without objection from plaintiffs. Such intervention was actually used by Southern to obviate the necessity of its

responding to a subpoena duces tecum through which it might well have been required to produce documentary evidence. Moreover, such interventions are a part of the general duties of the Bureau.[8]

As stated in its report, "The Commission is the guardian of the general public interest and proceedings before it are not in the nature of private litigation but matters of public concern in which the whole body of shippers and carriers is interested. Phillips Co. v. Grand Trunk W.Ry.Co., 236 U.S. 662 [35 S.Ct. 444, 59 L.Ed. 774]; United States v. Merchants & Mfrs. Traffic Asso. of Sacramento, 242 U.S. 178, 188; Jewelers [41] Protective Union v. Pennsylvania R.Co., 36 I.C.C. 71." (308 I.C.C. 613.) It is altogether proper that specially trained agency staff members participate in proceedings of general interest to shippers and carriers, such as that instituted by the Shaw Company complaint. Viewed from the standpoint of due process, it is preferable that such participation be open and public where the interested parties can meet the issues raised by it, rather than by internal administrative memoranda which interested parties have no opportunity to study or contradict. Such open participation by a clearly separate administrative arm of the agency such as that complained of here violates neither the letter nor the spirit of the Administrative Procedure Act. See Section

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[8] A description of the Bureau and the duties assigned it have been published pursuant to 40 U.S.C.A. Section 47 and 5 U.S.C.A. Section 2(a)(1), at 23 Federal Register 2654: *Bureau of Inquiry and Compliance*—Investigates violations, prosecutes in court and assists the Department of Justice in prosecuting civil and criminal proceedings arising under all parts of the Act (except violations of the safety acts which are under the jurisdiction of the Section of Railroad Safety, Bureau of Safety and Service), and related acts such as the Elkins Act, the Clayton Anti-Trust Act and the Transportation of Explosives Act. When specifically authorized by the Commission, or a division thereof in any particular case or class of cases, participates in Commission proceedings, for the purpose of developing facts and issues.

5(c). [5 U.S.C.A., § 1004(c).] The participation by the Bureau of which complaint is made here was in proper aid of the Commission's duty under Section 13(1) of the Interstate Commerce Act "to investigate the matters complained of in such manner and by such means as it shall deem proper."

We do not agree with plaintiffs that the Commission disqualified itself from acting on the Shaw Company complaint when it authorized the Department of Justice to file a civil action in this court seeking an injunction to prevent the consummation of the sale plan and to avert its continuing failure to collect rents. Civil Action No. 9155, United States v. Southern Railway Co. et al. That action resulted in an agreement by the railroad to maintain the *status quo* with respect to the sale plan pending a determination of the issue of its validity in the Commission proceeding.[7] Moreover, the Commission has a duty under Section 3 of the Elkins Act (49 U.S.C.A., § 43) whenever it has "reasonable ground for belief that any common carrier is committing any discrimination forbidden by law" to request the Department of Justice to institute such proceedings. That section provides that "the proceedings provided for by this Act shall not preclude" any other action provided by the Commerce Act.

Nor can the judgments entered in this court on the verdict of a jury against Shaw Company, Birmingham Ice,

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7. On August 28, 1958, Southern and Realty Company moved to dismiss the complaint of Shaw Company upon the filing of Civil Action 9155. The Commission overruled this motion by order dated October 29, 1958, stating "that the injunction proceeding filed in the United States District Court for the Northern District of Alabama (Southern Division) does not prejudice the issues in this proceeding, and that the said injunction proceeding is being held in abeyance pending a determination by the Commission of the issues in this proceeding". However, the Commission refused to rule on the validity of the sale plan because it considered that such action would be "manifestly premature." 308 I.C.C. at 616.

and Boggs Cold Storage Company, in their suits for damages be *res judicata* of the Commission order, as plaintiffs contend. Those judgments are now pending an appeal in the Court of Appeals for the Fifth Circuit, but regardless of the outcome of such appeals, the appropriate conditions for application of the doctrine of *res judicata* are not present. The parties are not even the same. The success or failure of private litigation cannot have the effect to bar or stay the power of the Commission to act in a public proceeding such as that before the Commission under the Shaw Company complaint. See Land v. Dollar, 330 U.S. 731 (1947). Furthermore, although such judgments were entered in June, 1959, over six months prior to the Commission's decision and order, no claim of *res judicata* was made before the Commission and none was included in plaintiff's petition for reconsideration filed in November, 1959. Since the issue was not presented to the agency it cannot properly be raised in this proceeding. United States v. L. A. Tucker Truck Lines, 344 U.S. 33 (1952).

[42] In support of their threshold contention that complainant warehouse had no standing before the Commission to challenge Southern's conduct, plaintiffs rely on the cases of Pittwood v. Northern Pacific R. Co., 51 I.C.C. 555 (1918), and Fireproof Storage Company v. Hines, 26 Fed. 215 (Wash. 1919). The holding in these cases was that the mere owner of property capable of being used as a warehouse on a railroad had no standing to complain of railroad rental practices affecting the value of his property. Neither case was appealed and the result reached in each of them may be inconsistent with the Supreme Court's apparent holding in Barringer v. United States, 319 U.S. 1, 13 (1943), that the protection of Section 3(1) of the Act extends to every person affected by violations of its prohibitions regardless of his relationship to transportation. However, we do not need to meet that question

since it appears that the Commission actually applied the doctrine of Pittwood and Fireproof Storage to warehouse operators in McCormick Warehouse Co. v. Pennsylvania R. Co., 95 I.C.C. 301 (1925), only to reverse its position on rehearing in the same case, 148 I.C.C. 299 (1928). The Commission there decided that warehouses are so closely connected with transportation that they are the actual shippers and receivers of freight for their customers, although the warehouses often neither own nor pay the cost of the freight, nor appear as parties to the bill of lading. As such they, like freight forwarders, have the status of shippers and receivers of freight under the Commerce Act. This holding was affirmed in Terminal Warehouse Co. of Baltimore v. United States, 31 F.2d 951, 957 (D.C. Md. 1929). This position has been sanctioned by the Supreme Court in such cases as Merchants Warehouse Co. v. United States, 283 U.S. 501 (1931), affirming 44 F.2d 379 (E.D. Pa. 1930), sustaining Gallagher v. Pennsylvania R. Co., 160 I.C.C. 563 (1929); Terminal Warehouse Company v Pennsylvania R. Co., 297 U.S. 500 (1936), affirming 78 F.2d 591 (C.C.A. 3, 1935), overruling 7 F.Supp. 484 (E.D. Pa., 1934). See also Propriety of Operating Practices—New York Warehousing, *supra*. Moreover, Section 13(1) of the Interstate Commerce Act appears to say that "any person" can file a complaint. This was interpreted in Merchants Warehouse Co. as follows:

> "The warehouse companies are 'persons' authorized to lodge a complaint with the Commission by § 13(1) of the Interstate Commerce Act, and they are 'persons' within the meaning of that word as used in §§ 2 and 3 of the Act."
>
> (283 U.S. at 512.)

Finally, plaintiffs complain that the order requiring them to base their rents on the prevailing market practice

in Birmingham in 1955, viz., 8 percent of land value and 10 percent of all costs except those which they are expressly authorized to exclude, is fatally vague. The claim of vagueness is based primarily on the fact that the exact amount of certain of these costs was not established before the Commission; only their existence and substantial nature were shown. However, the railroad obviously is in a position to establish the exact amount of these costs and the Commission's order properly places the onus on Southern to establish the full and true amount thereof by the filing of sworn affidavits setting out all such costs.

It follows that plaintiffs are not entitled to the relief for which they pray and that this action is due to be dismissed. An order of dismissal will be prepared and entered.

APPENDIX E.

ORDER ON PRETRIAL HEARING.

In the
UNITED STATES DISTRICT COURT
For the Northern District of Alabama,
Southern Division.

Civil Action.[a]

No. 9155.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

SOUTHERN RAILWAY COMPANY, ET AL.,
Defendants.

Civil Action.[b]

No. 9080.

BIRMINGHAM FOOD TERMINAL, INC.,
a Corporation, et al.,
Plaintiffs,

vs.

SOUTHERN RAILWAY COMPANY ET AL.,
Defendants.

Civil Action.[c]

No. 9815.

SOUTHERN RAILWAY COMPANY and GEORGIA
INDUSTRIAL REALTY COMPANY,
Plaintiffs,

vs.

A. K. INVESTMENT CORPORATION ET AL.,
Defendants.

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[a] *An Elkins Act suit for an injunction to enforce collection of rents under Commission's order from August 1, 1957 to date.*

[b] *A suit for declaratory judgment.*

[c] *A suit to collect rents under Interstate Commerce Commission order for the period commencing September 1, 1960.*

The above cases coming on to be heard on a regular pretrial hearing and all parties being present in person or by counsel, the following action was thereupon taken.

1. For the convenience of the parties and in the interest of justice, these actions are consolidated for the purpose of trial and will be tried to the court, without the intervention of a jury, on Monday, April 23, 1962, at 10:00 a. m.

The statement of the contentions of the parties makes it unnecessary to describe the pleadings in these actions.

2. It was agreed by all of the parties that the following are all of the issues in controversy in these cases:

No. 9155.

Issues raised by the original complaint and the complaint in intervention:

Contending that each defendant tenant is a shipper or consignee of freight within the intendment and coverage of the Elkins Act and the Interstate Commerce Act, plaintiff insists that defendants Southern and Georgia Industrial are obliged to collect and defendant tenants are bound to pay rentals computed upon the cost base found by the Interstate Commerce Commission from August 1, 1957, including the obligation of defendant Jefferson Warehouse, as successor to Thomas N. Nelson and Birmingham Terminal for such rentals unpaid by and uncollected from its predecessors. Plaintiff further insists that no tenant should be allowed to purchase below such cost basis and that defendants Southern and Georgia Industrial should be prohibited from extending credit in any form in aid of such purchases.

In addition, the complaint in intervention prays for the assessment of treble damages under the Elkins Act for unpaid and uncollected rent.

Issues raised by defendant tenants except W. L. Smith, Jefferson Warehouse, Southern Bonded Warehouse and W. C. Hudlow, Jr.:

Each defendant insists that its connection with the shipment or receipt of freight is not such as to bring it within the coverage of the Elkins Act or the Interstate Commerce Act. Each defendant also contends that, without the aid of Southern's credit, it should be permitted to purchase its premises at present fair market value though less than the cost basis found by the Commission.

Issues raised by defendants Jefferson Warehouse and W. C. Hudlow, Jr.:

Defendant Jefferson Warehouse admits that it is covered by the acts; defendant Hudlow denies that he is. Defendant Jefferson Warehouse denies that it is a successor to Thomas N. Nelson or Birmingham Terminal in the sense that it is liable for rents unpaid by or uncollected from such companies. Each defendant insists that it would be inequitable to apply the Commission's cost formula for any period prior to the effective date of its order, September 1, 1960; that its rentals should be reexamined in the light of all circumstances which have intervened between the hearings conducted by the Commission and the present, and that neither is bound by the Commission's order establishing a rental formula or the schedule of rentals filed by Southern pursuant to such order.

All defendants join in the foregoing contentions relevant to them. These defendants adopt the contentions of other defendants tenants with respect to the right to purchase premises.

Issues raised by defendant W. L. Smith:

Defendant denies that it is covered by either act and contends that it is not interested in purchasing property. Defendant further insists that any rental it agreed to pay should be reduced because the premises actually constructed for it were substantially less than those which Southern had agreed to construct. Such defendant also contends that it vacated the premises concerned prior to the effective date of the Commission order and further, adopts the contentions of other defendants relevant to it.

Issues raised by defendant Southern Bonded:

Such defendant denies that it is covered by the acts and that it is interested in any purchase. It insists that it no longer is a tenant of the premises concerned and contends that it has paid in full all rent required by the Commission formula since September 1, 1960. In addition, it adopts all contentions of other defendants relevant to it.

Defendants Southern and Georgia Industrial tender the following issues:

Defendants have attempted to comply with the September 1, 1960, order of the Commission. In doing so they neither claim nor concede that such order was correct but recognize that such order imposes a legal obligation to comply therewith with respect to tenants subject to such order. They explicitly contend that the so-called round-robin contract with the tenants was violative of no law.

Denying the invalidity of the original purchase agreement, defendants nevertheless insist that since there are no other outstanding proposals to purchase or sell, any issue relating thereto is now moot.

Nos. 9080 and 9815.

All legal issues, except those relating to the counterclaim filed by defendants in No. 9815 on January 12, 1962, are embraced within the order on pretrial hearing entered in No. 9155.

Since the counterclaim is not at issue, a further pretrial hearing of limited scope may be held on notice.

It is, therefore, Ordered by the court that all of the above-named allowances and agreements be and the same are hereby binding upon all parties in the above-styled cases, unless this order be hereafter modified by order of the court.

Done, this the 15th day of January, 1962.

Seybourn H. Lynne,
Judge.